

## Announcement in Police Entries

Two recently enacted federal statutes give police the power to enter dwellings unannounced to search and arrest. Such "no-knock" powers supersede the rule that law officers must pause at the threshold to request admittance and to state their identity and their purpose.<sup>1</sup> Though a number of states permit no-knock entries in certain exceptional circumstances,<sup>2</sup> the first federally sponsored no-knock legislation was the District of Columbia Court Reform and Criminal Procedure Act of 1970.<sup>3</sup> In addition, the Controlled Substances Act of 1970 provides no-knock search powers for federal narcotics agents operating nationwide.<sup>4</sup>

This federal interest in no-knock legislation is significant not solely because District of Columbia police and federal narcotics agents will possess another investigative technique. The attention generated by federal approval of no-knock makes it likely that those states which already sanction such powers will use them more frequently and that other states will seriously consider passing their own no-knock statutes. Federal experience with no-knock in the narcotics field may also suggest systematic use of these powers in other areas of law enforcement.

As the right of unannounced police entry is increasingly exercised, the Fourth Amendment rules of announcement will be invoked by those challenging the constitutionality of expanded no-knock powers. After examining the purposes announcement served at common law, this Note will develop a framework with which to identify those limited situations when, under the Fourth Amendment, announcement may reasonably be abrogated. This framework will be used to evaluate the recent federal no-knock legislation. These no-knock powers, it will be shown, are overbroad and, unless carefully restricted, seriously undermine the constitutional guarantees of the Fourth Amendment.

1. This is the procedure that applies to most entrances. See pp. 146-47 *infra*. There are qualifications to the rule, however. See pp. 147-48 *infra*.

2. For a short summary of the law in each state see Sonnenreich and Ebner, *No-Knock and Non-Sense, an Alleged Constitutional Problem*, 44 ST. J. L. REV. 626, 654-59 (1970); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 560-61 (1964).

3. D.C. Code Ann. §§ 23-521 to 522, 84 Stat. 473, Pub. L. No. 91-358 § 210 (July 29, 1970) [hereinafter cited as D.C. Criminal Procedure Act].

4. 84 Stat. 1236, Pub. L. No. 91-513 § 509(b) (Oct. 27, 1970) [hereinafter cited as 1970 Drug Act].

## I. History of the Announcement Rule

A. *Purposes*

As a defined legal system gradually replaced self-help remedies in medieval England, announcement before entering premises to seize chattels developed as a means of *decreasing the potential for violence*.<sup>5</sup> The violence to be avoided was that committed either by the possessor, legally entitled to defend his possession, or by the person seeking possession.<sup>6</sup> As the right to regain goods was gradually circumscribed and the right to defend property given greater weight, limitations on the right of an outsider to enter land and dwellings were formalized.<sup>7</sup> Though greater reliance subsequently was placed on official action to retake stolen goods,<sup>8</sup> the requirement of announcement was enforced against entries by public officers as well. It became necessary for a public official seeking stolen goods to identify himself *and* his mission, or risk being guilty

5. Announcement requirements had probably played a similar role in earlier societies where the monopolization of violence by the state had taken place. Biblical law had prohibited a creditor from entering his debtor's house to obtain security for the debt. DEUTERONOMY 24:10. In ancient Rome a person searching for stolen goods had the following means of publicizing his purpose. After specifically describing the goods he was seeking, he could search, in the presence of witnesses, the house where the goods were thought to be. He was accompanied by a bailiff of the court, who was his legal authority, and a public crier who proclaimed the theft of the various articles. Any person whose house was searched would thus have due notice of the event and its purpose. Notice having been given, the searcher could have his slave break doors if necessary. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 17-18 (1937) [hereinafter cited as LASSON]. When law's authority expanded, the prohibitions against asserting one's own rights by force became more frequent and detailed. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 278 (1966). For example, by the thirteenth century a man who retook goods by force committed a trespass and ran the risk of being treated as a thief. *Id.* at 279. Possession was given legal protection, not because of the possessor's intrinsic merits, but because "to allow men to make forcible entries on land or to seize goods without form of law is to invite violence." 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 41 (2d ed. reissued 1968).

6. The origins of the necessity of self-identification by one seeking stolen goods can be seen in the ancient action for the recovery of such goods. This action was aimed at the punishment of the thief as well as recovery of the stolen articles. The search was conducted by the victim of the crime before any proceedings took place in a court of law. If cattle were stolen, he would follow the trail leading onto a man's land where he seized and claimed the animal. He then declared it to be his and called upon the incumbent possessor to state his title. If the possessor also claimed the beast both claimants appeared in court. The intruder on the property had to state his reason for being there. 2 F. POLLOCK & F. MAITLAND, *supra* note 5, at 157-58, 168.

7. For example, the crime of *hamsocn*, literally, "home-breaking," the forcible entry into a man's dwelling, was punished severely in the tenth century. It was justifiable to kill anyone committing the crime without the usual payment of compensation to his family. LASSON at 19. At the end of the fifteenth century peaceable recapture of stolen goods was allowed; and it was lawful for this purpose to enter upon the land of the person who had wrongfully taken the goods but not break into his house. Y.B.B. 9 Ed. IV., Mich. pl. 10; 21 Hy. VII. Hil. pl. 18, noted in W. HOLDSWORTH, *supra* note 5, at 279.

8. W. HOLDSWORTH, *supra* note 5, at 598. This development occurred gradually and was not yet complete by the latter 16th century.

of a crime as well as subject to legitimate attack.<sup>9</sup> Declaration of identity and purpose by both citizens and officials was thus one aspect of the community's effort to impose public order.

A second purpose of announcement prior to entrance for search or arrest was *protection of privacy*. An unexpected intrusion by a private party came to be regarded as an invasion of a man's privacy and therefore a tortious assault.<sup>10</sup> This reasoning was extended to incursions by public officers, so that their unannounced entrance was also regarded as an infringement of privacy.<sup>11</sup> *Semayne's Case*,<sup>12</sup> the leading decision requiring announcement before entry in the execution of a warrant,

9. In *Ratcliffe v. Burton*, a case where an officer with an arrest warrant broke inner doors of a dwelling without demand for admittance after entering peacefully through the outer door, Justice Heath commented: "Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance." 3 Bos. and Pul. 223, 230, 127 Eng. Rep. 123, 126 (C.P. 1802). Justice Heath also observed that the absence of notice would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. Shall it be said that in such a case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand for admittance?

*Id.* at 230, 127. Justice Rook saw that demand for entry would also remove the need for violence on the part of the officers: "What a privilege will be allowed to sheriff's officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!" *Id.* *Launock v. Brown* was one of the first cases specifically concerning a search warrant. When the warrant for guns illegally used in game poaching was executed without a request of admission, it was asked:

[I]f no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost. 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (K.B. 1819).

10. This regard for privacy grew out of the protection of possession: "The possessor's possession is protected, not indeed because he has any sort or right in the thing, but because in general one cannot disturb his possession without being guilty, or almost guilty, of some injury to his person, some act which, if it does not amount to an assault, comes so dangerously near to an assault that it can be regarded as an invasion of that sphere of peace and quiet which the law should guarantee to every one of its subjects." 2 F. POLLOCK & F. MAITLAND, *supra* note 5, at 41-42. In *Rogers v. Spence*, 13 Meeson and Welsby 571, 581 (Ex. 1844), the court said: "These rights of action are given in respect of the immediate and present violation . . . of possession . . . independently . . . of rights of property. . . ."

11. See, e.g., *Semayne's Case*, discussed p. 143 *infra*. In *Waterhouse v. Saltmarsh* the sheriff, executing a civil warrant, entered an open outer door and climbed the stairs to a locked bedroom door. Though his party knocked on the door, "without telling what they were, or wherefore they came," the sheriff and his aides broke open the door. The Star-Chamber fined the sheriff for "the unnecessary terror and outrage and terror of this arrest, and for not signifying that he was the sheriff, that the door might have been opened without violence . . ." Hob. 263, 264, 80 Eng. Rep. 409 (K.B. 1724). Cf. *Penton v. Brown*, 1 Keble 668, 83 Eng. Rep. 1193 (1664), where the breaking of barn doors without request for admission was upheld because the barn was not part of the dwelling. Such a distinction between house and barn points up the function of supporting the right of privacy served by the announcement rule.

12. 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1603). This case is more fully discussed at p. 143 *infra*. The fact that the warrant in *Semayne's Case* was civil made it easier for the court to find an incursion on privacy since the state interest in its execution was less. See also *Park v. Evans*, Hob. 62, 80 Eng. Rep. 211 (K.B. 1724).

contained an early expression of this rationale: "[T]he house of every one is to him as his castle and fortress as well as his defense against violence as for his repose . . . ."<sup>13</sup>

A third purpose of the announcement requirement was *to prevent the physical destruction of property*. Such destruction would leave the home open to attack from the street. In seventeenth century England, doors and window shutters could not be easily replaced, and, if damaged, they could not shield the homeowner from the severe dangers outside.<sup>14</sup> A request for entrance by an official obviously gave the property owner the opportunity to prevent his bulwark of safety from being destroyed.

### B. *English Experience*

By 1791 the need for notice before officials could forcibly enter was firmly established in England.<sup>15</sup> The announcement rule was first

13. 5 Co. Rep. 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). The man's home is his castle theme has received endless repetition, perhaps most eloquently by William Pitt, in a Parliamentary debate on searches to enforce an excise on cider: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" Quoted in *Miller v. United States*, 357 U.S. 301, 307 (1958). Picturesque as it is, this statement was never really true. It was early held that doors to a dwelling could be broken by royal officials upon proper demand. *Semayne's Case* was one of the precedents for this doctrine. See p. 143 *infra*.

14. When the court in *Semayne's Case* stated that the home was a defense against violence, it presumably meant violence primarily from thieves and marauders. *Semayne's Case* held that though the sheriff could not break doors to do execution on the body or goods of a debtor (a civil execution), he could enter if the door was open. This holding can only be justified if the intact preservation of the door is regarded as a purpose of the announcement rule. The sheriff's entrance when the door was open would obviously not expose the homeowner to the threat of outside violence any more than he was already. See also, *Ryan v. Shiloch*, 7 Ex. 70, 155 Eng. Rep. 861 (1851). Similarly, destruction of inner doors would not remove protection against invasion from the street and was therefore not privileged. *Hutcheson v. Burch*, 4 Taunt 619, 128 Eng. Rep. 473 (C.P. 1812); but see *Ratcliffe v. Burton*, 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (C.P. 1802).

In the 1774 case of *Lee v. Gansel* a bailiff had broken open an inner door after he gave notice of his presence. Lord Mansfield gave the following rationale for the rule against breaking doors or windows in the execution of warrants:

The ground of this; that otherwise the consequences would be fatal for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences.

1 Cowp. 1, 6, 98 Eng. Rep. 935, 938 (1774).

Breaking of entrances at night was particularly shunned, since it left the inhabitants vulnerable at the time of greatest danger. See *Foster v. Holl*, 1 Bulstrode 146, 80 Eng. Rep. 839 (1640). Even where demand for admission was properly made, the destruction of doors and windows was unlawful in many instances, such as execution of civil process, because the law sought to avoid the greater evil. See *Cook's Case*, Cro. Car. 537, 79 Eng. Rep. 1063 (K.B. 1640).

15. Because of the stress placed on physical integrity of a home's passages to the outside, there was much discussion in cases and commentary of conditions allowing a door to be broken to execute a warrant or to make an arrest without a warrant, but these discussions presumed that *when* doors could be broken it was only after announcement. For

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stated in *Semayne's Case*<sup>16</sup> in 1603; although the case involved execution of a civil writ, the court said, in dicta:

In all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors . . . .<sup>17</sup>

Announcement thus came to include a statement of identity and purpose by the executing officer<sup>18</sup> and exceptions to announcement were severely limited.<sup>19</sup> Notice was required both in arrests and searches.<sup>20</sup>

summaries of the circumstances justifying the breaking of a door to effect a search or arrest, see *Miller v. United States*, 357 U.S. 301, 307-8 (1958); *Accarino v. United States*, 179 F.2d 456, 460 (D.C. Cir. 1949); Blakey, *supra* note 2, at 502-4; Thomas, *The Execution of Warrants of Arrest*, CRIM. L. REV. 520, 597, 601-4 (1962); Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798, 802 (1924); 1 CHITTY, CRIMINAL LAW 53, 56, 57, 66 (1832); 2 HALE, PLEAS OF THE CROWN 107, 116, 149-52 (1778).

Not all warrants legally justified the breaking of doors at all, even with proper notice. *E.g.*, *Semayne's Case*, *supra* note 12, put forth the distinction between breaking into a house to execute a warrant at the suit of an individual, which was impermissible, and executing a warrant used in connection with criminal proceedings which, in dicta, was held permissible. Notice was especially important since a homeowner who was given notice of an attempted execution of certain writs could lawfully refuse to open his door and the official could not legally break it down. See *Park v. Evans*, Hob. 62, 80 Eng. Rep. 211 (1724).

16. *Supra* note 12. Thus, though the occasions which would permit the breaking of doors were a matter of controversy, it was held that when doors *could* be broken, *it was only after notice was given*.

17. 5 Co. Rep. at 91a, 77 Eng. Rep. at 195 (K.B. 1603). Though *Semayne's Case* involved the execution of a civil writ, it has been widely cited for the manner of execution of criminal process. See, *e.g.*, *Burdett v. Abbot*, 14 East 1, 157, 162, 104 Eng. Rep. 501, 561, 563 (1811).

18. In 1756 in the Case of Richard Curtis, Fost. 135, 168 Eng. Rep. 67 (1757) the majority held that although no precise form of words was required, the party had a right to be given notice that the officer came not as a trespasser, but claiming to act under proper authority. The minority would have required an even stricter rule, that the officers declare in an explicit manner the nature of their warrants.

19. See notes 88 and 90 *infra*.

20. See, *e.g.*, *Semayne's Case*, *supra* note 12. See also Blakey, *supra* note 2, at 502-04; Thomas, *supra* note 15, at 520, 597, 601-04.

In the seventeenth and eighteenth centuries search warrants were used for blatantly political purposes, such as seizing an opponent's papers, and were the subject of public attention and outrage. Cf. LASSON at 43-48. Every detail of these warrants was under public scrutiny and complaints about their lack of specificity in naming the persons or things to be seized, the absence of oath or probable cause, and their often unlimited duration were common. See generally LASSON at 23-50. In this atmosphere, the absence of complaints about silent entries by victims of these intrusions, who were quick to criticize other aspects of the warrants, strongly implies that announcement was given. It is possible that failings in announcement were overshadowed by other outrages of the writs, but it is more likely that the warrants were served with announcement.

There is strong evidence that notice was observed in the execution of search warrants. Contemporary commentary on the warrants' execution declared that officers could break doors to search for stolen goods if their demand for admittance was first refused, necessarily implying that announcement was customarily given: "If the door be shut and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door . . . ." 2 HALE, *supra* note 15, at 151. Hale elsewhere contended that no doors could be broken in a general search for stolen goods. *Id.*

Efforts to legislate no-knock authorization were repeatedly resisted in the eighteenth century,<sup>21</sup> despite the fact that such powers were proposed as a means of increasing police effectiveness.<sup>22</sup>

### C. *American Experience Before 1789*

American colonial experience with announcement prior to entrance was parallel to England's: execution of all warrants was made with notice. There are no reported cases in America before 1791 discussing exceptions to announcement.<sup>23</sup> This was true even for writs of assistance, broad search warrants which were used to enforce the Navigation Acts and which elicited strong colonial opposition.<sup>24</sup> The legislation cre-

at 116. "With respect to the mode of executing this [search] warrant, if the door be shut, and, *upon demand*, not opened, it may be broken open . . ." 1 CHITTY, *supra* note 15, at 66 (emphasis added).

In a seventeenth century attack on the excise tax and the searches enforcing it, an anonymous polemicist noted, in passing, that government officials had to request admission before executing their otherwise unlimited warrants: "Officers . . . upon every suspicion, and often malicious information, come into our houses, with armed men, *and if not immediately let in*, violently break open our doors, to the great affrightment and amazement of our wives, children and families." Anon., *Excise Anatomiz'd* 15 (1659, 1733 ed.) quoted in LASSON at 34 n.77 (emphasis added). Even writs of assistance empowered the breaking open of doors, chests or packages only if resistance was met, a condition that strongly implies that some type of identification was given. See note 25 *infra*.

21. English parliamentary legislation prior to the Bill of Rights in the United States in 1791, prohibited entry into buildings without announcement. Such legislation made clear Parliament's accordance with the rudimentary judicial doctrine of announcement. The 1757 bill for controlling pawnbrokers empowered justices to issue search warrants for pawned contraband, but constables executing the warrants could forcibly enter homes only if they were refused admittance. 30 Geo. 2, c. 24 (1757), discussed in 3 L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 79 (1966). The London and Westminster Police Bill of 1785 would have permitted the breaking of doors to make searches, seemingly without announcement, and its defeat reflected opposition to such governmental power. Search warrants issued under the proposed bill would have authorized the police to enter or break into any premises to search for stolen goods, or to seize vagabonds, receivers, felons or their accomplices. Many of the most heated objections to the bill were voiced against the broadened police powers of search and entry. *Id.* at 109, 114.

22. In fact, the rule of announcement was so firmly entrenched in England by the latter part of the eighteenth century, that the proposal by a noted jurist of no-knock powers for police was seen as a radical innovation. In 1795, Patrick Culquhoun published his *Treatise on Police*, proposing, as part of a general widening of police search powers, that the police be enabled to search buildings at night and suddenly to force open doors or windows. *A TREATISE ON THE POLICE OF THE METROPOLIS EXPLAINING THE VARIOUS CRIMES WHICH AT PRESENT ARE FELT AS A PRESSURE UPON THE COMMUNITY; AND SUGGESTING REMEDIES FOR THEIR PREVENTION, BY A MAGISTRATE* 202-03 (1795), quoted in 3 RADZINOWICZ *supra* note, 21 at 272. That this scheme was presented in a program of reform and innovation in 1795 would certainly suggest that the police in England did not at the time have the discretion to make no-knock entries. In the years immediately before 1791, then, search without announcement was not countenanced, despite repeated attempts to broaden search powers to include it.

23. The earliest case found by Sonnenreich and Ebner, *supra* note 2, at 629, was *Read v. Case*, 4 Conn. 166 (1822) discussed at note 88 *infra*.

24. Writs of assistance were first authorized by the Act of Charles II of 1662 which empowered the Court of Exchequer to issue the writs to search for uncustomed or prohibited goods. 13-14 Charles II, c.11, § V (1662); LASSON at 53. The writs received their name from the fact that they commanded all British subjects to assist in their execution. LASSON at 53-54.

O. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* (1951) contends

ating the writs required that notice be given before entry was made,<sup>25</sup> and reported instances of its use included notice.<sup>26</sup> The colonists, acutely sensitive to intrusions under the writs, did not list absence of announcement among their complaints.<sup>27</sup> Searches under the writs had an immediate impact in sparking the Revolution,<sup>28</sup> and the draftsmen of the Bill of Rights were certainly familiar with them. It is fair to assume that the framers did not consider any arrest or search to be reasonable that did not include the level of announcement present even in the hated writs of assistance.<sup>29</sup>

that the manner of enforcing the revenue acts, and not merely the acts themselves, was responsible for the change in attitude by many colonists which produced the Revolution. Dickerson states that England's mercantilist policies contributed to the growth and prosperity of the colonies, and, for the most part, did not stifle the expansion of American industry and agriculture. The colonists, aware of their favorable position, did little to evade or abolish these trade laws. When the economic regulations were transformed into revenue raising devices, with the intrusions on personal property rights incumbent on their enforcement, opposition to the British presence mushroomed. This new policy of taxation and exploitation which replaced England's protective benevolence, in the interest of a political faction in England, disintegrated colonial loyalty. "The evidence indicates that it was the use made of the incidental provisions of [the revenue acts] to attack fundamentally the liberty and property of Americans that in six short years transformed thousands of loyal British subjects into active revolutionists." *Id.* at 208, 290-300 and *passim*.

See also *Harris v. United States*, 331 U.S. 145, 159 (Frankfurter, J., dissenting); 10 ADAMS, WORKS 247; *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); *Ker v. California*, 374 U.S. 23 (opinion of Brennan, J.).

25. The act creating the writs of assistance granted the right of forcible entry to a customs official carrying a writ. He could take a constable or other civil official with him in the daytime to "enter and go into any house, shop, cellar, warehouse or room or other place, and in case of resistance, to break open doors, chests, trunks and other packages, there to seize and from thence to bring, any kind of goods or merchandise whatsoever, prohibited and uncustomed." 13-14 Charles II, c. II, c. 11 §§ IV, V; made applicable to colonies: 7-8 William II, c. 22 § VI (1696) (emphasis added).

26. There are no reported cases of forcible entries where demand was *not* made. For example, an attempt by a customs official in 1774 to enforce the revenue laws against trade between the colonies of Delaware and Maryland, through searches for uncustomed goods, was preceded by a demand to comply "in the name of the law." DICKERSON, *supra* note 24, at 252.

When James Otis argued against writs of assistance in Superior Court in Massachusetts in 1761 he alluded with distaste to the power of customhouse officials to force entry to houses. See H. MILLER, *THE CASE FOR LIBERTY* 130-33 (1965); 2 C. ADAMS, *THE LIFE AND WORKS OF JOHN ADAMS* 523-25 (1850); LASSON at 58-60. In John Adams' account of the speech, Otis said, "Customhouse officers may enter our houses, when they please; *we are commanded to permit the entry.*" C. ADAMS, *supra*, at 524 (emphasis added). It appears, then, that execution of writs of assistance in the American colonies necessitated the same prior announcement by the customs officials as their execution in England.

27. Cf. LASSON at 54.

28. See note 24 *supra*.

29. Though neither state nor federal constitutional search provisions nor the debates about them speak of the manner in which warrants shall be executed, it would be unreasonable to assume that the standard would be any less than that for the general warrants and writs of assistance which the newly independent Americans were abolishing. In response to the *perceived* injustices of the writs, beginning with the Virginia Bill of Rights in 1776, seven states passed constitutional provisions dealing with the government power to effect searches. LASSON at 82. These declarations were aimed, in more or less specific terms, at the activities of the British before the Revolution. Thus, some states explicitly prohibited general warrants while others did so in effect by outlawing warrants issued without oath and without specification of the persons or objects to be searched or

## II. The Requirement of Announcement and Its Exceptions

A diverse body of state common law was created subsequent to ratification of the Bill of Rights, often producing exceptions to the announcement rule.<sup>30</sup> To rationalize this conflicting law, the Supreme Court, in the 1963 case of *Ker v. California*, held that the Fourth Amendment incorporated the rule of announcement as an essential element of a reasonable search.<sup>31</sup> The Court in *Ker* also held, however, that in certain circumstances the Constitution may not require announcement.<sup>32</sup> The eight Justices who adopted the announcement rule as a constitutional prerequisite to police entrances split four-four over the type of finding that would justify abandonment of notice.<sup>33</sup> There have been no Supreme Court decisions since *Ker* dealing with the constitutionality of the announcement rule and its exceptions.<sup>34</sup>

seized and without a limited duration. LASSON at 79-82. Lack of announcement was not specifically dealt with because there were not exceptions to announcement in the colonial period. For the Court's practice of looking at the colonial experience to interpret the Fourth Amendment see p. 154 *infra*.

30. See discussion of California law, at pp. 160-62 *infra*, as an example. See also Blakey, *supra* note 2, at 509 n.84; Sonnenreich and Ebner, *supra* note 2, at 654-59. A table of the status of the law of announcement, statutory and judicial, in the fifty states appears *id.* at 654-59. The majority of the state decisions do not allude to the Fourth Amendment problems inherent in state, as well as federal, police entries since *Mapp v. Ohio*, 367 U.S. 643 (1961), made the Fourth Amendment applicable to the states, and will not be discussed here. The Court's decision in *Mapp* generated a stream of cases testing state common law by constitutional standards, leading to consideration of *Ker*. See N. SOBEL, CURRENT PROBLEMS IN THE LAW OF SEARCH AND SEIZURE 7 (1964).

31. 374 U.S. 23, 37, 47. Lawful entry had been held to be an indispensable predicate of a reasonable search in *Gould v. United States*, 255 U.S. 298 (1920). In that case a business acquaintance had been invited into Gould's office, where he seized papers without a warrant when Gould left the room.

*Ker* concerned California's interpretation of the common law requirement of notice before entrance. *People v. Ker*, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961). Police officers had observed a man, driving a car registered in George Ker's name, meeting with a known marijuana dealer. The officers followed the suspect from the meeting but lost him when he made a U-turn in the middle of the block. Discovering that Ker was the registered owner of the car and having information that he had purchased marijuana previously, the police went to his address, where they obtained a passkey from the manager. Without knocking or giving notice, an officer opened the door with the key and entered. George Ker was sitting in the living room and his wife was in the kitchen, where the officer soon found more than two pounds of marijuana.

32. 374 U.S. 23, 37-44, 47-64. See pp. 147-48 *infra*.

33. Justice Harlan, the ninth Justice, contended that the Fourth Amendment did not apply to the states as it did to the federal government. Judging the entry by Fourteenth Amendment concepts of "fundamental fairness," he found it valid. 374 U.S. at 44-46. The resulting five-four decision upheld the Ker's conviction, affirming the lower court.

34. On two other occasions the Court has decided cases on announcement, but both have been based on interpretations of the federal common law. In *Miller v. United States*, 357 U.S. 301 (1958), the Court required announcement in arrests without a warrant, following the federal statutory provision of 18 U.S.C. § 3109 (1948), that demands announcement in execution of search warrants. It noted, however, as a reason for its decision to extend the protections of § 3109 to arrests without warrant that "[t]he requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application," and that such a requirement was "embedded in Anglo-American law." *Id.* at 313. In *Sabbath*



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### A. *The Elements of Announcement*

From *Ker* and from other cases, three elements have emerged as necessary to a proper police announcement prior to entry: (1) notice of presence in the form of knocking or ringing the doorbell; (2) identification of authority as law enforcement officers; (3) statement of lawful purpose. The Supreme Court has clearly indicated that all three of these elements must be present to constitute proper announcement. *Sabbath v. United States*<sup>35</sup> affirmed the need for an indication of police presence prior to entry. In *Miller v. United States*,<sup>36</sup> officers stated "police" in a low voice, then immediately burst into the dwelling. The Court held that they should have declared their purpose and requested admission. Thus it is not proper for the officers to assume that because their *presence* is known, their obligation to announce their *purpose* is eliminated.<sup>37</sup> A suspect is not expected to open the door until he is given a reason to do so.

### B. *Exceptions to Announcement*

In their separate opinions in *Ker*, Justices Clark and Brennan articulated different definitions of those situations which constitute exceptions to the announcement rule. Justice Clark first declared that exigent circumstances would justify an officer's failure to give notice. Rather than detail just what these circumstances would be, he merely pointed out that the officers believed *Ker* to be "in possession of narcotics, which could be quickly and easily destroyed."<sup>38</sup> Further, *Ker*'s "furtive conduct" in eluding the officer shortly before the arrest was ground for the supposition that *Ker* "might well have been expecting the police."<sup>39</sup> In these circumstances, the constitutional requirements of announcement could legitimately be abrogated, in Justice Clark's

v. *United States*, 391 U.S. 585 (1969), the Court required announcement before police could enter through an unlocked door.

35. 391 U.S. 585 (1968).

36. 347 U.S. 301 (1958); *See also* *People v. Boone*, 2 Cal. App. 3d 503, 82 Cal. Rptr. 56 (1970) (police self-identification is not useless by plainclothes policemen in unmarked car). *Cf. Waterhouse v. Saltmarsh*, Hob. 264, 80 Eng. Rep. 409 (1724).

37. In *Wong Sun v. United States*, 371 U.S. 471 (1963), a narcotics agent investigating a heroin sale went to Wong Sun's laundry. The agent first identified himself as a customer, then announced himself as a narcotics agent, at which point Wong Sun slammed the door in his face and fled down a hall. In declaring that the homeowner must grant admission only when the purpose and identity of the officer are clear the Court said: "When an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous conduct." *Id.* at 482.

38. 374 U.S. at 40.

39. *Id.* *Ker*'s "furtive conduct" consisted of the U-turn he made while being followed by the police. There was no showing that he did this to throw the police off the trail. Justice Brennan's dissent disputes the notion that *Ker*'s conduct indicated he knew police were following him. *Id.* at 60-61.

view. Justice Clark seems to imply, then, that in cases involving easily disposable contraband or where the suspect can be expected to be aware of an impending police entrance, notice is not necessary.<sup>40</sup> This test would include, in theory, whole classes of crimes where the evidence to be seized was easily disposable.

Justice Brennan gave a much more precise definition of those situations which constitute exceptions to the announcement rule:

(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.<sup>41</sup>

Justice Clark hinted at Justice Brennan's first exception when he noted that the Kers might have been expecting the police. Further, his opinion is consistent with the second exception regarding violence to inhabitants, because invocation of that exception is rare and because he seems, in general, more amenable to exceptions to announcement than Justice Brennan.

Moreover, the two Justices agree that certain circumstances demonstrating destruction of evidence or attempted escape will allow unannounced entry. Justice Brennan explicitly states that his list is exhaustive,<sup>42</sup> but it is highly probable that he would include violent resistance to search or arrest, along with destruction of evidence and escape, in his third exception. With that modification, Justice Brennan's opinion correctly expounds all foreseeable exceptions to the announcement rule.

The main disagreement between the two opinions, then, is over what evidence will constitute probable cause for the exceptions to announcement, particularly for the exception when destruction of evidence or resistance is threatened. This disagreement is critical since it is unclear which opinion, Justice Brennan's or Justice Clark's, provides guidance for future administration of the exceptions.<sup>43</sup>

40. Thus, Justice Clark found it significant that the arresting officer in *Ker*, on the basis of "hundreds of arrests involving marijuana," testified that "'on many, many occasions' in his experience with narcotics arrests 'persons have flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance . . .'" 374 U.S. at 28 n.3.

41. *Id.* at 47. Any one of the three situations would be sufficient to invoke an exceptional silent entry.

42. *Id.*

43. Despite the confusion over which opinion should control, the Supreme Court has

### III. Principles Governing the Nature of Probable Cause Determinations for Exceptions to the Announcement Rule

Three questions of constitutional importance revolve around the administration of exceptions to the announcement rule: 1) the nature of the reasonableness standard used to evaluate 2) the type of evidence that will go to the determination of probable cause and 3) the official who decides probable cause. Reasonableness is an issue because the word does not have a fixed meaning throughout Fourth Amendment cases.<sup>44</sup> The kind and quantity of evidence that will go to probable cause is crucial in deciding what factual situations require no-knock, as the Clark-Brennan disagreement in *Ker* makes clear. Finally, the types of evidence properly constituting probable cause have implications for determining when the judge or policeman should make the initial decision authorizing unannounced entry and for the type of review which should be given that initial decision.

In order to decide these difficult questions, it is necessary to develop principles of interpretation to guide analysis of constitutional issues in the announcement area. The evolution of these principles will depend on striking a balance between those values that are enhanced by no-knock powers and those that are harmed. Broadly speaking, "the requirement of probable cause is a compromise for accommodating the opposing interests of the public in crime prevention and detection and of individuals in privacy and security."<sup>45</sup>

The tension in the administration of no-knock, as in many stages of the criminal process,<sup>46</sup> is between efficient processing of the highest

declined to reconsider *Ker*. In 1966 the Court denied certiorari to *People v. De Lago*, 16 N.Y.2d 289, 213 N.E.2d 659 (1965), *cert. denied*, 383 U.S. 963 (1966), a New York case in which Judge Van Voorhis upheld no-knock in a gambling case where there was no showing how the gambling materials would be destroyed. It was enough that "the court could take judicial notice that contraband of that nature is easily secreted or destroyed" if persons possessing it are given notice. *Id.* at 292. In refusing to overturn this "blanket" rule for entire classes of offenses, it would seem the Supreme Court was following Clark's opinion. Justice Marshall's opinion in *Sabbath v. United States*, 391 U.S. 585 (1968), however, refers, in a cryptic footnote, to the exceptions to an announcement rule in Justice Brennan's opinion in *Ker*. *Id.* at 591 n.8. It is unclear, then, in which direction the Court will move, if it moves at all.

44. What constitutes a "reasonable" search varies depending on the situation. For example execution of a search warrant at night requires a more stringent showing than mere probability. See p. 156 *infra*. On the other hand, a "stop-and-frisk" street search for dangerous weapons may require a lesser showing of need to be reasonable. *Terry v. Ohio*, 392 U.S. 1 (1968). For a discussion of the variable nature of the meaning of reasonableness and the cases that demonstrate it, see LaFave, "*Street Encounters*" and the Constitution: *Terry Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 54 (1968).

45. LaFave, *supra* note 44, at 54.

46. The dichotomy between efficiency in crime prevention and primacy of the individual has been characterized by Herbert L. Packer as two models of criminal procedure: the

number of guilty and protection of individuals by limiting official power and eliminating all possible mistake.<sup>47</sup> No matter how certain the probable cause showing is, there will always be individuals who are not, in fact, engaged in the suspected behavior. In the case of no-knock powers, there will thus be a certain percentage of persons who have not committed or who are not committing a crime but who are nonetheless subject to no-knock entries by the police. There will also be a second group, who, though they will in fact be guilty of the basic offense (*e.g.*, drug possession), will not be engaged in behavior which justifies an exception to the announcement rule. The fundamental issue resolved by probable cause requirements in the use of no-knock powers is thus how much we care to protect people who are not engaging in the kind of behavior calling for elimination of announcement. If our concern with these individuals is great, if the values served by the announcement rules are important, and if the values served by no-knock powers are relatively unimportant, then we want strict probable cause requirements for the administration of the exceptions, in order to reduce the percentage of persons unnecessarily subjected to unannounced entries.<sup>48</sup>

#### A. *Values Served by No-Knock*

Advocates of no-knock claim these powers aid crime control by increasing *speed* and *surprise* and augmenting *safety* in execution of searches and arrests. In some instances, it is argued, the police will, through no-knock entries, seize evidence that would otherwise be de-

Crime Control model and Due Process model. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

47. *Id.* at 9-23.

48. An analogous approach to probable cause is taken by LaFave in his analysis of street encounter arrests and searches. LaFave, *supra*, note 44 at 55. LaFave finds support for this test in the cases of *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967); and *See v. City of Seattle*, 387 U.S. 541 (1967). In *Camara* and *See*, "the Court called for a 'balance [of] the need to search against the invasion which the search entails.' The Court then adopted a lower standard of probable cause for inspection warrants, in part because these inspections 'involve a relatively limited version of the urban citizen's privacy.' Thus a new fourth amendment calculus was brought into being . . . ." *Id.* at 55-56. His concept of "variable probable cause" attempts to weigh, for constitutional purposes, the additional crime control capability given by an enforcement technique against the degree of imposition on the individual. He postulates that "less evidence is needed to meet the probable cause test when the consequences for the individual are less serious," and it follows that more evidence is needed when the results for the individual are more serious, or when the advantages to crime control are less sure. *Id.* at 54. The aim of his analysis is to establish guidelines for distinct kinds of official action so as to avoid leaving the policy choice to ad hoc decision making. The balancing test is not a matter of case-by-case application, "but rather a technique for establishing the quantum of evidence needed for certain distinct kinds of official action." *Id.* at 57.

## Announcement in Police Entries

stroyed, thus greatly increasing chances of obtaining a conviction.<sup>49</sup> The absence of notice may also increase police safety, since a crucial edge of speed or surprise may foil a violent assault on the invading officers.<sup>50</sup> Elimination of announcement may, it is also said, prevent an escape from arrest.<sup>51</sup>

In assessing the significance of the policies served by no-knock, it is important to realize, however, that the time saved by the absence of announcement is on the order of thirty seconds or a minute. Without no-knock authority the officers may still break into a dwelling. The difference is that their forcible entry must be preceded by a verbal statement of who they are and why they are there, giving inhabitants a reasonable opportunity to open the door and admit them.<sup>52</sup> There will surely be many instances where the additional speed engendered by a silent entrance will make no difference whatsoever to the results of the search or arrest.<sup>53</sup>

Furthermore, the factor of surprise which no-knock adds to execution of searches and arrests, and which supporters claim is important in preventing destruction of evidence, resistance or escape, may not al-

49. See, e.g., Blakey, *supra* note 2, at 557; HOUSE COMM. ON THE DIST. OF COLUM., DIST. OF COLUM. COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970, H.R. REP. NO. 907, 91st Cong., 2d Sess. 108-09 (1970); 116 CONG. REC. S587 (daily ed. Jan. 26, 1970) (remarks of Senator Dodd).

50. See, e.g., HOUSE COMM. ON THE DIST. OF COLUM., *supra* note 49, at 107; 116 CONG. REC. S587 (daily ed. Jan. 26, 1970) (remarks of Senator Dodd).

51. See, e.g., HOUSE COMM. ON DIST. OF COLUM., *supra* note 49, at 107.

52. The first step on arriving at the suspect's dwelling is to knock on the door or ring the bell. If someone comes to the door, the officer identifies himself and his purpose. He may then use force to enter the dwelling if the person who answers the door runs away, yells a warning or otherwise prevents the officers from entering. In cases where no one answers the door in response to their knock, the police nonetheless announce their identity and purpose. If they are not let in they then may use force to break into the premises. For a law enforcement officer's manual detailing these procedures, see U.S. DEPT. OF JUSTICE, HANDBOOK ON THE LAW OF SEARCH AND SEIZURE 7 (1968).

53. In the Senate debate on the no-knock bills their sponsors argued that the amount of time taken by announcement was crucial in permitting suspects to destroy evidence and/or prepare violently to repel the police. Nowhere in the Senate debates or hearings on the drug bill, though, did the author find mention of specific instances of announcements delaying police for crucial moments. Many law enforcement officers testified in the hearings who supported the no-knock provision, but none described past problems they had with announcement in their searches or what cases would have developed differently under the proposed no-knock legislation. But see HOUSE COMM. ON THE DISTRICT OF COLUM., REPORT ON H.R. 16196, DISTRICT OF COLUM. COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970, H.R. REP. NO. 907, 91st Cong., 2d Sess. 108-09 (1970): "In 1962 . . . it was reported that less than 30 seconds were necessary to destroy all the evidence of a wire service headquarters. McClellan, *Gambling and Organized Crime*, S. Rep. No. 1310, 87th Cong., 2d Sess. Experience has shown that numbers bets are recorded on either 'flash' paper which ignites on contact with fire or 'water soluble' paper which dissolves on contact with water, and that the time spent by the executing officer in giving notice and waiting to be refused admittance is used by the gambler to destroy his work product . . . . Experience has shown that the time consumed by the executing officers in announcing their authority and purpose and waiting to be refused admittance is used by the drug trafficker in disposing of his narcotics down the toilet."

ways be present in unannounced entries. The police will surprise the suspects only if they can arrive on the scene in a stealthy manner. Obviously, if police must spend two minutes hammering the door down, the inhabitants should be fairly certain that someone is trying to get in.

Safety to the executing officers is a function of no-knock's speed and surprise. Though personal safety is obviously very important, it is questionable whether no-knock really makes entry safer for the officers. Gains to safety must be measured in the light of the knowledge that entries without announcement may meet *legally justified violent responses* from homeowners.<sup>54</sup>

Even when no-knock is not authorized, there are other, though less effective, remedies to deal with the evils of destruction of evidence and resistance to law officers. These acts can be punished as contempt of court for obstructing the service of legal process,<sup>55</sup> as criminal assaults on an officer, or as a criminal offense for preventing the seizure of evidence.<sup>56</sup>

#### B. *Values Served by Announcement*

The reasons for the birth and development of the announcement rule at common law—protection of privacy, mitigation of violence, and preservation of property—remain of great importance to our present society. The sanctity of the home has been given constitutional dimensions in a number of Supreme Court decisions.<sup>57</sup> As the tech-

54. For further discussion of the safety issue see pp. 153-54 *infra*. It can be argued that the tactical advantages of no-knock are of greater importance in fighting the specially serious crimes like narcotics use and gambling. It has also been contended that since narcotics and gambling are "but aspects of the larger problem of organized crime" the threat posed by such crime must be considered as well. Blakey, *supra* note 2, at 556: "The danger to our freedom presented by organized crime differs appreciably from the traditional danger that all crime poses." One problem with this argument is that "organized crime" cannot be defined. Even if it could be defined it would also be impossible to ascertain that a particular criminal transaction or suspect is connected with organized crime until after arrest or trial. Furthermore, neither the 1970 Drug Act or the D.C. Criminal Procedure Act limit the use of no-knock to investigations of organized crime. Once no-knock powers exist they may be applied far beyond any conceivable definition of organized crime. Even if we posit that selling drugs is a part of organized crime while possession is not, as discussed below at note 117, the 1970 Drug Act will not, in practice, distinguish between the two in the use of no-knock.

55. Annot. 39 A.L.R. 1354 (1925).

56. The D.C. Criminal Procedure Act creates an offense carrying a fine of \$5,000 or sentence of up to five years for "[w]hoever, after notice is given . . . or after entry where such notice is unnecessary . . . destroys, conceals, disposes of, attempts to destroy, conceal or dispose of, or otherwise prevents the seizure of evidence. . . ." D.C. Code Ann. § 23-591(d). It is, of course, a criminal offense in all jurisdictions to use force against a police officer exercising his duties, and where notice was given any violent resistance of an entry to make a search would clearly be a violation. Where notice is *not* given, it is highly uncertain that a violent response by the homeowner would be illegal. See pp. 153-54 *infra*.

57. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967): "The basic purpose of [the Fourth Amendment] as recognized by countless decisions of this Court, is to safeguard

nological capability of public and private agencies to pierce the walls of a dwelling grows, the need for staunch maintenance of legal barriers to entry increases accordingly. The areas in which a person can feel free from unexpected intrusion are few indeed. Thus, police announcement of their presence, identity and purpose in execution of a search or arrest provides a basis for a belief that one need not fear an unexpected incursion; this psychological security is arguably as important as a few minutes notice to an inhabitant during which he can dress or unlock the door.<sup>58</sup> The requirement of announcement secures to an individual the feeling of control over his own dwelling, upholding the dignity of the citizen against the state. No one can enjoy privacy who is not master of the grant or denial of access to others.<sup>59</sup> In both the figurative and literal senses, privacy is impossible unless a person can maintain the boundaries he desires between himself and the rest of his environment.<sup>60</sup> Broadly interpreted exceptions to the announcement rule palpably weaken private control of those boundaries.

Moreover today, as in the past, the homeowner is entitled under common law to repulse an unannounced invader by force.<sup>61</sup> As both police and public continue to arm themselves to the teeth,<sup>62</sup> police entrances under no-knock cannot but lead to many violent incidents. The consequences of large numbers of unannounced entries are truly frightening. Many homeowners in a high crime area may well open fire on *any* unannounced entrant, thus endangering police. Equally important, in such a situation police may well counterattack with all available firepower. It is conceivable that police might make an unannounced entrance to draw fire, thus providing the justification for an official fusillade.<sup>63</sup> Further, unannounced entries can provoke outbursts of public

the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is 'basic to a free society.' " See also *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (dissent of Harlan, J.); cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

58. Two commentators describe the avoidance of a broken door or embarrassment to persons engaged in sexual acts as the only possible, and "somewhat tenuous," protections to privacy. Sonnenreich and Ebner, *supra* note 2, at 647.

59. Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

60. See *id.* at 475-86.

61. See Annot. 25 A.L.R. 508, Annot. 32 A.L.R. 1541, Annot. 34 A.L.R. 488. See also *Starr v. United States*, 153 U.S. 614, 620-21 (1894); *State v. Cessna*, 170 Iowa 726, 153 N.W. 194 (1915). If notice is given, force may not be used. *Commonwealth v. Reynolds*, 120 Mass. 190 (1876).

62. See, e.g., U.S. NATIONAL COMMISSION ON CAUSES AND PREVENTION OF VIOLENCE, REPORT (1969); *New York Times*, July 29, 1969, at 1, col. 1.

63. This may have happened in the raid on the Chicago Black Panther headquarters that resulted in the deaths of Fred Hampton and Mark Clark. The special federal grand jury in Chicago found that only one shot had been fired from inside the apartment, while at least 82 shots were fired by entering police. The grand jury report found that the

violence expressing outrage at such incursions.<sup>64</sup>

The danger of violent response and counter-response obviously should be minimized when the suspect is innocent of any criminal behavior or when the suspect has actually committed the suspected crime but is not acting in a manner which justifies abrogation of the announcement rule. In both cases, the suspect may well be heavily armed. Not only will the suspect think he has the right to use force, but police, once fired upon or attacked, will feel compelled to retaliate. A court will have an extraordinarily difficult time assessing who is legally responsible for the subsequent injuries in so delicate a situation. Thus, a sphere of "no-law" is created by no-knock powers, where both police and the suspect may employ force—force which, on both parts, cannot clearly be called legitimate or illegitimate. The probability of this ambiguous—and therefore highly undesirable—use of force by either private parties or public officials will be increased by the absence of announcement. It follows therefore that announcement should be maximized in order to reduce that "no-law" sphere.<sup>65</sup>

The function of preserving doors and windows from destruction, while arguably less important today than in the past, retains some validity. In those critical cases in which the suspect is in *fact* not involved in behavior justifying an exception to the announcement requirement, an occurrence that will inevitably result under any probable cause standard, there is a needless and fairly costly destruction of property.<sup>66</sup>

Finally, informing the balance of interests is the intent of the framers that announcement be required. With announcement, as with all other areas of Fourth Amendment jurisprudence, the Supreme Court should place heavy reliance on the intent of the framers.<sup>67</sup>

police at best were returning "one another's fire." New York Times, May 16, 1970, at 1, col. 1.

64. Thus there were minor public disturbances in a black neighborhood of Washington, D.C., following the sledge-hammer opening of a door in a fruitless search for narcotics. Washington Post, Sept. 26, 1970, at B1-B2, col. 6.

65. Thus, while announcement on occasion may endanger the safety of the executing officer, see p. 152 *supra*, the absence of no-knock has equivalent, if not greater, dangers. After announcement, at least, the legal rights of the parties to use force are clear.

66. In Washington, D.C., police will pay for the broken door only when they have gone to the wrong address, producing increasing complaints by citizens forced to replace their doors. Washington Post, Sept. 26, 1970, at B1-B2, col. 6. The purpose of preserving property served by announcement thus continues to be important today.

67. See *Boyd v. United States*, 116 U.S. 616, 624-26 (1886); *Harris v. United States*, 331 U.S. 145, 162 (1947) (dissent of Frankfurter, J.):

"Unreasonable" is not to be determined with reference to a particular search and seizure considered in isolation. The "reason" by which search and seizure is to be tested is the "reason" that was written out of historic experience into the Fourth Amendment. Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence. *Id.* at 159.

See also I. BRANT, *THE BILL OF RIGHTS* 79 (1965):



C. *Principles Governing the Probable Cause Determination*

In resolving the conflict between the announcement rule and the no-knock procedures, the constitutional status of the announcement requirement and the serious harms to innocent parties attendant on no-knock's use argue for strict probable cause requirements, if elimination of announcement is to be justifiable. As noted above, loose probable cause requirements will increase the number of individuals who are not engaged in activity bringing them within the terms of announcement's exceptions but who will be subjected, nonetheless, to unannounced police entries. Tighter requirements will, in contrast, minimize that number. The small gains in speed and surprise from no-knock procedures, compared with both the threats to privacy and property and the significant danger of violent harm to occupants and police resulting from lack of announcement, make it imperative that the number of people who are not engaged in behavior that would constitute an exception to the announcement rule and yet whose homes are violated by unannounced entries be minimized. Therefore, the *general principle of interpretation in the administration of no-knock powers should be maximization of announcement through stringent probable cause requirements*. This principle has three corollaries:

*Specificity.* As the Court made explicit in *Terry v. Ohio*<sup>68</sup> the "central teaching" of Fourth Amendment jurisprudence is the need for specificity in the information upon which police action is predicated: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."<sup>69</sup> Specificity contributes to minimizing the instances where no-knock is used unnecessarily. It does this by demanding that the evidence used to establish probable cause relates to information about the particular time, place and individual upon which the search or arrest is based.

*High probability.* To maximize the instances where announcement is used, the only no-knock entrances that should be "reasonable" under

If it is true that freedom is a growing thing, it cannot have a lesser meaning today or tomorrow than it had at the birth of our nation. . . . [W]hat the framers of the Bill of Rights thought they were doing . . . will form a barricade against retreat.

68. 392 U.S. 1, 21 n.18 (1968). The Court derived this statement from the following cases: *Beck v. Ohio*, 379 U.S. 89, 96-97 (1964); *Ker v. California*, 374 U.S. 23, 34-37 (1963); *Wong Sun v. United States*, 371 U.S. 471, 479-84 (1963); *Rios v. United States*, 364 U.S. 253, 261-62 (1960); *Henry v. United States*, 361 U.S. 98, 100-02 (1959); *Draper v. United States*, 358 U.S. 307, 312-14 (1959); *Brinegar v. United States*, 338 U.S. 160, 175-78 (1949).

69. 392 U.S. at 21.

the Fourth Amendment are situations where there is a high probability no-knock is necessary; *i.e.*, that the "exceptional situation" is, in fact, occurring.<sup>70</sup> The more rigorous probable cause test which is invoked when searches are to be executed at night provides a useful analogy; daytime search is favored to better protect privacy and avoid violence—precisely the same policies which urge the maximization of announcement prior to entry. The Federal Rules of Criminal Procedure demand a higher degree of probable cause for these nighttime search warrants than for warrants in general: nighttime execution is permissible only "if the affidavits are positive that the property is on the person or in the place to be searched . . . ."<sup>71</sup> If the standard for exceptions to announcement requires high probability, a showing of mere likelihood, *a fortiori*, is not adequate to support a probable cause finding. Given the great importance of announcement values, the specific facts should almost certainly constitute an exceptional situation before announcement is waived.<sup>72</sup> This higher level of probability for probable cause to use no-knock would not affect the lower level of probable cause necessary for the underlying search or arrest in any way.<sup>73</sup> The higher probability for an authorization for silent entry thus would not influence the number of searches or arrests made.

*Careful review.* The need for high probability and specificity dictate that the initial probable cause decision be made after careful consideration of the evidence presented.<sup>74</sup> Also, in light of the constitutional issues involved, there should be careful scrutiny of the initial decision by officer or magistrate.<sup>75</sup> When the facts justifying an unannounced search or arrest do not meet constitutional requirements, the exclusionary rule applies, it was held in *Ker*, barring any evidence which is the product of the entry from use at trial.<sup>76</sup>

70. In its first announcement case, *Miller v. United States*, 357 U.S. 301, the Court hinted strongly that officers could dispense with announcement if "the facts known to officers would justify them in being virtually certain that the [suspect] already knows their purpose . . . ." *Id.* at 310. Thus there is precedent for the high probability of what constitutes probable cause.

71. Fed. R. Crim. P. 41(c). See also *Jones v. United States*, 357 U.S. 493, 498 (1958), where the Court emphasizes that the officers must be *positive*.

72. For a strikingly different result to the probable cause balancing test see *Blakey*, *supra* note 2, at 555-59.

73. Cf. *United States v. Arms*, 392 F.2d 300, 301 (1968), a case concerning nighttime execution of a search warrant. The court contrasted the facts to justify an affiant in being "positive" "with the lesser quantum sufficient only to support a belief that the property is to be found in the premises for which a search warrant is sought."

74. See p. 170 *infra*.

75. Cf. *Weed v. United States*, 340 F.2d 827, 828 (1965): "[C]lose scrutiny of such a determinative issue is required to assure protection of constitutional rights and to aid in the promulgation of uniform constitutional privileges."

76. *Ker v. California*, 374 U.S. 23, 46-47 (opinion of Justice Brennan). This holding is derived from *Mapp v. Ohio*, 367 U.S. 643 (1961).

#### IV. Administration of the Exceptions

The maximization of announcement principle and its corollaries shape answers to the questions raised above about *what* kinds of evidence establish probable cause and *who* determines whether sufficient probable cause exists to warrant no-knock. Even though cases have not yet arisen under the federal no-knock statutes, the relative value of different kinds of evidence can be assessed in the light of the suggested framework of analysis. The following discussion will apply that framework to each of Justice Brennan's exceptions to announcement.

##### A. *Evidentiary Sources of Probable Cause Determination*

1) *Officers presence and purpose are known.* There clearly ought to be a high probability that the suspect *actually* knows the police are at his door desiring admittance before this exception can apply. Imputed knowledge or a belief by police officers that the reasonable suspect would always assume an unannounced entrant to be the police would never suffice. One case meeting the criteria of specificity and high probability would be the hot pursuit of a suspect into his own dwelling.<sup>77</sup> An escape to the dwelling of another is slightly more difficult, since the arrival of the suspect might not alert the inhabitants of the dwelling to the impending appearance of the police.<sup>78</sup>

Absent hot pursuit, there are few situations that will sufficiently establish that the officers' presence and purpose are both known. Frenzied shouts of "it's the police!" accompanied by noise of commotion within the dwelling is one example.<sup>79</sup> Once their *presence* is known, the officers may not assume, however, that their obligation to announce

77. It is stated in an annotator's note to *Semayne's Case*, *supra* note 12, that "if a man being legally arrested, escapeth from the officer, the officer may upon fresh suit break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused." 77 Eng. Rep. at 196; 374 U.S. 23, 54 n.8. *But see* Warden v. Hayden, 387 U.S. 294 (1967).

78. *Semayne's Case* describes such a situation as follows: "J beats R so he is in danger of death, . . . J retreats into the house of T. They who pursue him, if the house be kept and defended with force (which proves that first request ought to be made) may lawfully break the house of T." 77 Eng. Rep. at 196. The Case of Richard Curtis, Post. 35, 168 Eng. Rep. 67 (1757), involved officers executing an escape warrant who shouted their authority and purpose through the locked door. Chitty states that the house of a third party harboring an offender may be broken open only after the usual demand. CHITTY, *supra* note 15, at 57. *See also* Ratcliffe v. Burton, 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (1802) (Judge Heath).

Early English law was probably reluctant to permit the breaking of the doors of a third person housing a fugitive, even where it was likely that notice would be superfluous, because of the concern that was placed on preserving the doors intact. Annihilation of this barrier against the dangers of the locale was disfavored. *See* 142 *supra*.

79. *People v. Clay*, 273 Cal. App. 2d 279, 78 Cal. Rptr. 56 (1969).

their purpose is eliminated.<sup>80</sup> They must be "virtually certain"<sup>81</sup> that all three elements of a lawful announcement—presence, identity and purpose—are known to the suspect before announcement is a "superfluous act the law does not require."<sup>82</sup>

When this level of certainty is present, this exception does not conflict with the aims of the announcement rule. Where the identity and purpose of the officer are known his entrance can be fairly anticipated, lessening, if not eliminating, the imposition on the inhabitant's privacy. Similarly, the kind of violent response a homeowner is entitled to wreak on an unknown trespasser would not lawfully be permitted to one who is aware that an officer is about to enter. Violent attack in such a situation would not be defense of the home, but a premeditated assault on the officer.<sup>83</sup>

2) *Person in imminent danger.* This exception should generally be based on police observance of attack on a party in a dwelling or on the publicly announced intention of the suspects to harm the person they are detaining if police enter (as in the holding of hostages). It should be remembered that this exception applies only where the imminent danger is to the person *already inside* the place to be searched. Ambiguous noise or activity in a building is never enough by itself to justify the exception.<sup>84</sup> Although this exception has a relatively ancient history,<sup>85</sup> there are few recorded cases of its use.<sup>86</sup> Thus this exception

80. See p. 147 *supra*.

81. The "virtually certain" test comes from *Miller v. United States*. See note 70 *supra*.

82. 374 U.S. at 55. Professor Wilgus has written: "Before doors are broken, there must be a necessity for so doing and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, unless this is already understood, or the peril would be increased." Wilgus, *Arrest Without Warrant*, 22 MICH. J. REV. 798, 802 (1924).

83. This should be contrasted to the situation where announcement is absent and attack may be legally permissible. See pp. 153-54 *supra*.

84. But see *People v. Roberts*, 47 Cal. 2d 374, 303 P.2d 721 (1956). The police investigating a robbery went to a suspect's apartment and knocked. No one answered but they heard several moans and groans that sounded as if a person was in distress, so they had the apartment manager let them in. Though a search of the apartment revealed that no one was there, the police scanned the room for stolen goods, finding one. On cross-examination one of the officers said that in his present opinion the moaning could have been pigeons. Nevertheless, the court held that the entire testimony of the officers was not so incredulous as to be rejected as unworthy of belief.

85. Chitty states that "in case of an actual affray made in a house, within the view and hearing of a constable . . . he may break open the doors to arrest the affrayers, or suppress the tumult. And it has been decided that upon a violent cry of murder in a house, any person may break open the door to prevent the commission of a felony." But Chitty goes on to state that "in all cases whatever . . . it is absolutely necessary that a demand for admittance should be made, and be refused, before outer doors can be broken." CHITTY, *supra* note 15, at 56.

86. Even advocates of no-knock can present few instances of this exception. See Blakey, *supra* note 2, at 542-43.

to announcement will probably be invoked quite rarely; abuse will be difficult, in the absence of outright fabrication of evidence by police.<sup>87</sup>

3) *Destruction of evidence, resistance or escape.* Since no-knock legislation is designed to operate almost exclusively within the exception for destruction of evidence, resistance or escape, the situations which will establish this exception in essence determine the scope of no-knock authority.<sup>88</sup> The following kinds of evidence are most likely to be introduced to justify an unannounced entry under this exception:

(1) police experience with a certain class of crime; (2) past behavior of the suspect; and information, most often gained through informers, as to (3) the intended reaction of the suspect to a police raid or (4) the type, quantity and (5) location of evidence; and (6) on-the-scene observation by the executing officers.<sup>89</sup>

*Blanket Rule:* Any finding of probable cause for no-knock solely on the basis of *police experience with a particular kind of offense* should be unconstitutional; it eliminates announcement in entire classes of crimes, is not specific to either the individual suspect or the time of entrance, and is not subject to review or control.<sup>90</sup> Justice Clark's opin-

87. See note 138 *infra*.

88. *Read v. Case*, an 1822 Connecticut case, is usually cited as the origin of American "destruction of evidence" exceptions to the common law rule of announcement. 4 Conn. 166. The case arose out of the attempt by defendant Case to arrest Read, for whom he had posted bail. The local sheriff had earlier proposed to Read that he surrender himself, to which Read had replied that he would defend himself with a gun. With this comment in mind the sheriff knocked on the door while Case, who was in Read's home, opened the door and seized Read's gun. The court created a narrow exception to the requirement of announcement where the inhabitant had resolved "with full knowledge of the purpose for which he was sought after, to resist even to the shedding of blood." The judge stated: "Imminent danger to human life, resulting from the threats and intended violence of the principal towards his bail, constitutes a case of high necessity . . ." Demand for entrance would have resulted in the most "brutal and unhallowed vengeance." *Id.* at 170. Cf. *The Case of Richard Curtis, Fost.* 135, 168 Eng. Rep. 67 (1757).

The outcome in this case can probably as easily be explained by the fact that Read knew that he was being sought and by whom, which would put him within Justice Brennan's first exception—where purpose and identity are known. He had told the very person making the entry that he would respond violently; it took little speculation by the sheriff to believe an announcement would increase both his peril and the likelihood of violence.

89. Neither Justice in *Ker* detailed the kind of information police should have before a no-knock entry would be permitted.

90. Two common law cases refused to find that the mere possibility of escape was enough to warrant a belief that the suspect would escape, for then there would *never* be an announcement. In *Ratcliffe v. Barton*, 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (1802), an officer broke an inner door without demand for admittance after entering peacefully through the outer doors. The majority rejected the contention of Chief Justice Alvanley that "If the officer have certain knowledge that the party is within the house, it might be absurd for him to demand any admittance; since if he were to do so, the party might possibly escape by the window while the officer was demanding admittance at the door." *Id.* at 229, 127 Eng. Rep. at 126. The majority, recognizing this possibility, felt it was outweighed by the dangers such power would produce in the hands of the sheriff. Sim-

ion in *Ker* appears to countenance such a "blanket" exception to the announcement requirement for certain offense categories, but close analysis of the reasoning which would approve the use of such evidence reveals grave flaws. Since there was no indication that the Kers had made any plans or attempts to destroy the evidence (the marijuana), Justice Clark supported the lack of announcement by stating that the officers believed that the Kers possessed narcotics, "which could be quickly and easily destroyed;"<sup>91</sup> that is, in other narcotics cases police announcement had resulted in attempts to destroy evidence, so the police in *Ker* were warranted in foregoing announcement in this case. Justice Clark's opinion, then, would allow evidence of police experience with a particular type of offender to fulfill, without more, the constitutional probable cause requirement. Justice Brennan explicated the injuries this test would inflict on Fourth Amendment values:

[I]f police experience in pursuing other narcotics suspects justified an unannounced police intrusion into a home the Fourth Amendment would afford no protection at all . . . . If mere police experience that some offenders have attempted to destroy contraband justifies unannounced entry in *any* case, and cures the total absence of evidence not only of awareness of the officers' presence but even of such an attempt in the *particular* case, I perceive no logical basis for distinguishing unannounced police entries into homes to make arrests for *any* crime involving evidence of a kind which public experience indicates might be destroyed or jettisoned.<sup>92</sup>

California's experience in administering the "blanket rule" of police experience to justify unannounced entries, and its subsequent rejection of that rule, are instructive in illustrating the dangers this test poses for announcement values. Justice Clark quoted extensively, and with approval from *People v. Maddox*,<sup>93</sup> the leading California case on exceptions to the requirement of announcement at the time. In that case the California Supreme Court moved sharply away from the requirement of announcement by permitting a no-knock entry where the officer believed in good faith evidence would be destroyed or the arrest or search resisted.<sup>94</sup> Since the police had probable cause to search in the

ilarly the court in *Launock v. Brown*, 2 B. & Ald. 592, 106 Eng. Rep. 482 (1819) rejected the defendant's argument that if a previous request be necessary it would give the party accused notice that he may make his escape.

91. 374 U.S. at 40.

92. *Id.* at 61-62 (emphasis in original). See also *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 115 (1963).

93. 46 Cal. 2d 301, 294 P.2d 6 (1956), *cert. denied*, 352 U.S. 858 (1956).

94. The standard set forth for future searches was that evidence would not be excluded when the facts known to the officer before his entry were "not inconsistent with a good

first place, no further showing was deemed necessary for them to enter unannounced.<sup>95</sup> Basing the decision to enter silently on the officer's "reasonable belief" that evidence would be destroyed soon led to the abandonment of announcement in whole varieties of offenses; the officer's belief about the behavior of a whole class of suspects was interpreted as sufficient for any specific instance within the class.<sup>96</sup> In reaction to these interpretations of the *Maddox* rule, in *People v. Gastello* the California Supreme Court cut back on the exception, requiring "a specific showing . . . to justify any kind of police action tending to disturb the security of the people in their homes."<sup>97</sup> The court in *Gastello* did not elaborate the elements of the "specific showing" that would excuse a silent entry, since there was not even a hint that the defendant, who was sleeping when the police arrived, was attempting to destroy evidence.<sup>98</sup>

In 1969 the California Supreme Court, in *People v. De Santiago*,<sup>99</sup> stated in more detail the factors which would constitute a reasonably specific showing of planned destruction of evidence or imminent escape to merit abandonment of the usual police statement of identity and purpose. The police must have particular reason, different from that providing the basic probable cause for entry, to enter without announcement. The court then gave two situations when officers could enter without announcement to preserve evidence intact: first, when officers have obtained *particular* information which leads them reasonably to conclude that the occupants of an apartment or residence have specifically resolved to effect disposal in the event of police intrusion, or have made specific preparations in that regard; and second, when officers

faith belief on the part of the officer that compliance with [the rule of announcement as required by] section 844 is excused." *Id.* at 306-07, 294 P.2d at 9.

95. "[S]ince the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees." *Id.* at 306, 294 P.2d at 9.

96. California Courts of Appeals quickly travelled down precisely the slippery slope described by Justice Brennan, to the point where the California Attorney General contended that silent entries are always reasonable in narcotics cases, since the suspects are always alert to destroy evidence. *See Blakey, supra* note 2, at 515-16. *See also* *People v. Ramsey*, 157 Cal. App. 2d 178, 320 P.2d 592 (1958) and *People v. Potter*, 144 Cal. App. 2d 350, 300 P.2d 889 (1956), where a prior criminal record was used to establish the possibility of peril which would justify entry without notice. For a summary of the problems in administering the *Maddox* exceptions and their tendency to slip into blanket avoidance of announcement in narcotics and bookmaking cases, *see* *People v. De Santiago*, 71 Cal. 2d 18, 22-23, 76 Cal. Rptr. 809, 813-14, 453 P.2d 353, 357-58 (1969); *People v. Gastello*, 67 Cal. 2d 586, 432 P.2d 706 (1967).

97. *Id.* at 588, 432 P.2d at 708.

98. A year later the court found a prior criminal record and escape from parole inadequate to create a reasonable police belief that a suspect would resist arrest. *People v. Rosales*, 66 Cal. Rptr. 1, 437 P.2d 489 (1968).

99. 71 Cal. 2d 18, 76 Cal. Rptr. 809, 453 P.2d 353 (1969).

prior to entry are able to detect activity from within which leads them reasonably to conclude that the occupants are then engaged in the destruction or concealment of evidence.<sup>100</sup> In *De Santiago*, the California Supreme Court thus abandoned the rule that police experience with a type of offender was sufficient to involve no-knock, and demanded a specific showing, either to the magistrate or by the officer on the scene, of some circumstances peculiar to that search. The dangers to citizens of relying on the "blanket rule" for certain types of crimes by failing to require specificity were thus found by California to be so serious that sole reliance on this type of evidence was unequivocally prohibited.

Justice Clark's approach in *Ker*, then, has grave flaws in view of California's experience and Justice Brennan's analysis. *De Santiago* and Justice Brennan are clearly correct in holding that a specific showing of facts peculiar to the given search must be present if the constitutional rule of announcement is to be maintained.<sup>101</sup> This lack of specificity in the "blanket rule" puts no limits on police discretion and makes judicial review impossible.<sup>102</sup> For these reasons, Justice Clark's opinion should not be followed. *De Santiago* and Justice Brennan, on the other hand, while meeting the demand for specificity, do not speak to the issue of the degree of probability in the probable cause showing. Their standards, if coupled with the high degree of probability necessary to maximize announcement values, would fulfill the needs of a constitutional definition of probable cause.

*Past behavior of the individual suspect:* Past behavior of the suspect will be probative of the need for silent entry only where it is directly related to the issues of destruction of evidence or resistance to arrest. A mere showing that the suspect has a criminal record reveals nothing

100. *Id.* at 816, 453 P.2d at 360.

101. See p. 160 *supra* and *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

102. Basing probable cause in the case of one narcotics suspect on the fact that many narcotics suspects attempt to destroy evidence reduces the probable cause showing to demonstrating that the suspect is involved with narcotics. Thus, no more need be shown than what constitutes probable cause for the search warrant itself. The probable cause requirement written in the no-knock provision therefore becomes a nullity. Furthermore, by basing probable cause on grounds related only to police experience, there is no semblance of tailoring the warrant to the needs of the particular situation. See p. 155 *supra*. If the judge is satisfied with the evidence that as a narcotics dealer the suspect can reasonably be expected to attempt to destroy evidence or resist the police, then the judge's role is correspondingly circumscribed. A major thrust of the effort to write no-knock provisions into search warrants is to establish judicial overview of these potentially explosive entries. See SENATE COMM. ON THE DISTRICT OF COLUM., REVISING THE CRIMINAL LAW AND PROCEDURE OF THE DISTRICT OF COLUM., AND FOR OTHER PURPOSES, S. REP. NO. 538, 91st Cong., 1st Sess. 13, 14 (1969). Cf. *Trupiano v. United States*, 334 U.S. 699, 705 (1948). An interpretation of the no-knock legislation that did not take advantage of this opportunity for judicial control would thus disregard the intent of Congress. Where information fulfilling the need for probable cause relates to neither the particular suspect nor locale to be searched only the most rudimentary judicial scrutiny is possible.



## Announcement in Police Entries

about his behavior in police searches. A prior record of resisting arrest is probative to some extent, depending upon the seriousness of the resistance and the number of times it has occurred. In the extreme case of numerous violent responses to police entrance, no-knock would be justified, but otherwise prior convictions, even for resisting arrest, should not, standing alone, justify no-knock. All prior behavior of this kind provides only a tenuous prediction of what a suspect may do in the future.<sup>103</sup> In short, predictions based on past behavior cannot be "specific" to time, nor probable enough to justify abrogation of announcement, unless the past behavior is so consistent as to warrant the virtually certain inference it will be repeated.

The next four categories of evidence—intent of suspect, and type, quantity and location of contraband—will almost invariably be based on informers' testimony.<sup>104</sup> The extent to which informer's testimony is specific and reliable is thus important in determining whether such evidence may go to the issue of probable cause. The Supreme Court recently held in *Spinelli v. United States*<sup>105</sup> that for a magistrate to make an independent judgment about probable cause the circumstances underlying the informer's conclusions must be given and the informant's reliability must be shown. If the circumstances underlying the informer's conclusions and his reliability are not demonstrated, the police may independently corroborate the details of the informant's tip.<sup>106</sup>

The first element of *Spinelli's* requirements, reliability of the informer, seems difficult to establish in drug and gambling cases. Since his livelihood, and possibly freedom from prosecution, depends heavily on police satisfaction with his work, the informer is often motivated

103. It may be argued that a suspect with a criminal record would be more anxious to avoid another conviction, carrying a longer sentence, and therefore more likely to attempt to frustrate a search, but there is no evidence that the motivations to impede a search are any greater for a person with a previous record than for one who has never been convicted. Cf. discussion of predictions of parole violation based on past behavior in R. DONNELLY, J. GOLDSTEIN AND R. SCHWARTZ, *CRIMINAL LAW* 238-41 (1962).

104. Informers are very heavily used in gambling and narcotics investigations. "Without a network of informers—usually civilians, sometimes police—narcotics police cannot operate." J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 120 (1966). "Present enforcement of federal narcotics laws depends largely upon the use of known drug peddlers to lead the Government to others involved in illegal activity. It is safe to say that ninety-five per cent of all federal narcotics cases are obtained as a result of the work of informers . . . ." Note, *Informers in Federal Narcotics Prosecutions*, 2 COLUM. J. L. & SOC. PROB. 47 (1966). See also Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L. J. 1091 (1951). For the police view, including a teaching manual and justification for the use of informers, written by two narcotics control officers, see M. HARNEY and J. CROSS, *THE INFORMER IN LAW ENFORCEMENT* (2d ed. 1968).

105. 393 U.S. 410 (1969).

106. *Id.* at 417. The example of corroboration given in *Spinelli* was independent police observation of facts given by the informer.

to create a case by entrapment or framing a suspect.<sup>107</sup> Usually the informer is under pressure from the law enforcement agency to make cases.<sup>108</sup> The informer knows what the police want and is prepared to give it to them if he possibly can, with accuracy and honesty often being of secondary importance.<sup>109</sup> Further, falsification of minor facts, where probable cause for the search or arrest already exists, will clearly be less disturbing to police and informers than a complete "frame-up."<sup>110</sup> The only difference resulting from fabrication of evidence to justify no-knock is the manner of entry, which may seem minor indeed to the informers.

Moreover, law enforcement officers, in their zeal to obtain a no-knock warrant, may distort and magnify informers' reports that the suspect plans to destroy evidence or resist arrest, or is armed, or has placed the evidence in a strategic location for destruction. Thus, informers' reliability should be further suspect. In other instances, an analogous pattern of police falsehood to establish probable cause for searching suspects on the street has developed.<sup>111</sup> In such a situation even a requirement of corroboration by the police officers may not cure the unreliability of the reports.

107. Donnelly, *supra* note 104, at 1099-1115. "The system rewards only the informer who successfully makes a 'sufficient' number of cases. Because of this emphasis, the informer, fighting for years of his life, will often go to any extent to achieve a good record. As a result, many persons . . . are involved in narcotics violations by an informer who needs to make a case." Note, *Informers in Federal Narcotics Prosecutions*, *supra* note 104, at 48-49. Cf. *Trent v. United States*, 284 F.2d 286 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 889 (1961).

108. Most informers are rewarded for their cooperation by low bail, lighter sentences and special treatment. Note, *Informers in Federal Narcotics Prosecutions*, *supra* note 104, at 51, 54. "[N]arcotics informers include primarily two types of people: those who are not addicts themselves, but who work in or around places addicts frequent; and known addicts. Non-addicts cooperate because they want to avoid difficulties with the police or more importantly, with 'official' agencies that inspect and license. . . . Addicts typically cooperate with police because they have been caught doing something illegal and want a reduction in charges or some sort of 'break' in the criminal process." SKOLNICK, *supra* note 104, at 123-24. See also HARNEY AND CROSS, *supra* note 104, at 33; Donnelly, *supra* note 104, at 1092-96.

109. "The police are also accustomed to getting a great deal of information, mostly false, from persons who have been arrested and who hope, by giving information, to obtain favorable treatment. Paid informants have also proved unreliable, since they sometimes fabricate stories in order to receive compensation." W. LAFAVE, *ARREST* 269 (1965).

110. Cf. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 177, 181 (1969); "In view of the substantial risk that a paid informant's story is inaccurate, if not false, it is not too much to expect that he might also falsify a claim to have personally observed the criminal activity . . . ."

111. Barlow, *Patterns of Arrest for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. LAW BULL. 549 (1968). Following the Supreme Court decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the fruits of a search conducted without probable cause could no longer be used as evidence in state courts, as had been their previous practice. Probable cause was difficult to find in misdemeanor cases unless the suspect was seen committing the crime or abandoning something that resembled contraband. After the *Mapp* decision, the number of police affidavits reporting that the suspect had dropped contraband before being searched ("dropsy" cases) jumped enormously. The

Because of the high danger of informer unreliability, it is important that the second element of *Spinelli* be firmly established—that the circumstances underlying informers' statements be known and have a high degree of specificity. But the following discussion of the kinds of evidence informers are likely to supply will reveal the evidence's lack of specificity to the suspect, time and place of search. Thus the underlying circumstances of the informers' information will present problems to an official making a probable cause determination.

*Expressed intent to destroy evidence or resist the search:* A statement by the accused, that he intends to destroy evidence or resist arrest in the event of police search, clearly should carry some evidentiary weight in determining whether probable cause exists for no-knock. However, even assuming reliability of informers, there is still a need to question the circumstances underlying the statements. An informer may be generalizing from his experience with classes of suspects<sup>112</sup> or projecting his own attitudes on the suspect, so the basis for his conclusions must be shown, as *Spinelli* indicates. Moreover, even when the underlying facts behind the informer's conclusion are given, further specific evidence ought to be required to allow silent entry. Expressions of intent, especially if given in response to hypothetical questions posed by the informant and interpreted by him,<sup>113</sup> do not relate to the specific search to be conducted. A vague declaration that one would destroy evidence in the event of a hypothetical search does not conclusively predict behavior in particular circumstances. Expressions of intent thus may not be specific enough as to time to establish, *without more*, the high probable cause necessary for exceptions to announcement.

*Type and quantity of evidence:* In general, the type of evidence reliably reported to exist at the scene of search is relevant to the no-knock decision only to the extent that such evidence may be easily

most likely conclusion, advanced by Paul Chevigny in his comments following the article, was that many policemen swore false affidavits in order to maintain their level of misdemeanor narcotics arrests. This new and dishonest activity arose in direct reaction to the *Mapp* decision. It is not unlikely that a new standard of probable cause in no-knock searches would call forth a similar response. Such "minor surgery upon the facts is a not uncommon phenomenon in police efforts to show probable cause for a certain kind of search." See, e.g., LAFAYE, *supra* note 44, at 65 n.126; Kuh, *In-Field Interrogation: Stop, Question, Detention and Frisk*, 3 CRIM. L. BULL. 597, 604 (1967); L. TIFFANY, D. MCINTYRE AND D. ROTENBERG, DETECTION OF CRIME 65 (1967).

112. See, e.g., *Martinez v. Superior Court for County of Los Angeles*, 78 Cal. Rptr. 427 (1969).

113. Leading questions and other "Socratic" devices could cause the suspect to admit that in some conceivable situations he would attempt to dispose of evidence or resist. The pressure on the informant to get this type of admission would be great. See pp. 163-64 *supra*.

destroyed. But ease of destruction goes only to feasibility; standing alone, such proof could not justify silent entry: some evidence of intent to destroy ought always be required. In narcotics cases, it should not be too difficult for the informer to identify the type or types of drug in the suspect's possession and give facts justifying his conclusion. Although some drugs (*e.g.*, heroin) can be destroyed more quickly than others (*e.g.*, marijuana),<sup>114</sup> knowledge of the type of drug alone would not sufficiently indicate the quantity in the suspect's possession.<sup>115</sup>

If the quantity is small, it will be possible to destroy; but mere possibility of disposal is not probative of an intent to destroy, and other evidence must be shown for silent entry. If the quantity of drugs is large enough, destruction of evidence in the time taken by announcement would be a physical impossibility, and would actually mitigate against no-knock. This is ironic because it seems likely that law officers will be most anxious to use a silent entry if large quantities are present, since arrests of major suppliers are highly desired.<sup>116</sup> Thus, if the quantity of drugs is above a size reasonable for destruction in the time taken by announcement no-knock should not be considered further; if the quantity is below that "crucial level" the high probability of destruction has then to be corroborated by other evidence.<sup>117</sup>

114. This results from the fact that, on the average, more marijuana than heroin is seized per arrest and also from the fact that pure heroin is cut with non-narcotic substances prior to use. The median quantity of narcotics (heroin) seized per case by the Bureau of Narcotics and Dangerous Drugs in 1969 was 67.6 grams, compared with 1008.5 grams per case in marijuana cases. *Hearings on S.1895, 2590, 2637 before the Subcommittee to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. at 663 (Sept. 15, 17, 18, 24-26, 29 and Oct. 20, 1969).

115. Also, the type of drug, to a certain extent, determines the seriousness of the offense. Since the seriousness of the offense in turn often influences the severity of judicial requirements for a search warrant, it is likely that probable cause for a no-knock entry will, in practice, be found to exist more easily in a case involving one type of drug than another. See TIFFANY, MCINTYRE AND ROTENBERG, *DETECTION OF CRIME* 119-20 (1967). Cf. *Brinegar v. United States*, 338 U.S. 160, 183 (opinion of Justice Jackson) (1949). The existence of a particular type of drug and the feasibility of its disposal in themselves, however, are not probative of an intent to destroy evidence or inflict bodily harm on a police officer.

116. See J. SKOLNICK, *supra* note 104, at 155-59.

117. It is interesting to note that the quantities seized in narcotics, marijuana and dangerous drugs cases by the Bureau of Narcotics in 1969 were often quite large; large enough as to be impossible of quick destruction. The average and median amounts seized of the three categories of drugs are given below. It is easy to see that under the no-knock provision of the drug law, probable cause in these cases often could not be based on the easy destructibility of the evidence. Several pounds of marijuana or heroin cannot be easily flushed, burned or otherwise destroyed.

	average per case (grams)	median per case (grams)
narcotics ( <i>e.g.</i> , heroin)	334	68
marijuana	21,853	1009
dangerous drugs ( <i>e.g.</i> , LSD)	324 dosage units	268 dosage units

Hearings, *supra* note 114, at 234, 236, 238.

## Announcement in Police Entries

In light of the constitutional right to bear arms and the widespread ownership of firearms, the existence of weapons at the site of the search could never establish the certainty of resistance. Even possession of illegal weapons, by itself, would not meet the necessary level of probability. Many police searches are routinely made of locations that contain weapons, legal and illegal, without meeting resistance. Only where the existence of weapons is accompanied by a clear intent to resist arrest could a no-knock entry be authorized.

*Location:* If evidence can be shown to be located where disposal would be quick and easy, an intent to destroy is probable.<sup>118</sup> However, the difficulty of ever establishing standards of how near to a potential instrument of disposal the evidence must be to find a positive intent to destroy mitigates against sole reliance on location for the establishment of probable cause for no-knock. Further, the time which elapses between the report of location and the execution of the silent entrance determines the weight which ought to be given to this piece of evidence; that is, when a substantial period elapses between the observation of location and execution, the evidence ought to have little probative value. This is especially true in narcotics offenses, where the drugs may be quickly distributed or consumed.<sup>119</sup>

Ordinarily probable cause for a search requires a showing that there is reason to believe the object of the search is at the location.<sup>120</sup> But with probable cause for no-knock, a shift in location of a few feet *within* the dwelling can negate a previous inference that destruction is in-

The quantity of drugs directly influences the granting of no-knock warrants under the 1970 Drug Act. Such a warrant can be granted only in cases "relating to offenses involving controlled dangerous substances the penalty for which is imprisonment for more than one year . . ." § 509(b), 1970 Drug Act. Possession, which involves a relatively small amount of drugs, by a person with no prior criminal record carries a penalty of less than one year. Drug Act § 404(a). Gearing no-knock warrants to only some drug offenses (those with penalties over one year) creates difficulties, because it will often be only after arrest that determination of the offense will be made. Possession with intent to manufacture, distribute or dispense is punishable by up to five years, § 401(b)(1)(B), simple possession by less than one year, § 501(e). The difference between the two is largely based on the quantity seized. See testimony of John E. Ingersoll before Senate Subcommittee on Juvenile Delinquency, Oct. 20, 1969, *Hearings, supra* note 114, at 673, 678. Also the length of penalty may depend on 1) the age of the distributor of drugs, 2) the age of the distributee-recipient, and 3) the difference in their ages—all facts often not known to the narcotics agents until after arrest. The no-knock provision of the 1969 Drug Bill thus asks that a determination of the offense be made prior to the search on the basis of knowledge that is very unlikely to be in the agent's possession at that time.

118. Narcotics have been known to be kept resting on a toilet bowl, ready to be flushed quickly down the drain. Bookmaking slips made of gelatin have been kept next to a pot of hot water which can rapidly dissolve them. HALL, KAMISAR, LAFAYE AND ISRAEL, *MODERN CRIMINAL PROCEDURE* 272 (3d ed. 1969).

119. For an account of police investigation of narcotics suppliers' methods of operations, see SKOLNICK, *supra* note 104, at 151.

120. Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

tended. Thus the lack of specificity in time of this information will usually prevent the drawing of any accurate inferences from the location of the evidence.<sup>121</sup> Also the informer will often not be able to disclose accurately the location of the drugs, which occupy a small space and may often be kept hidden to prevent theft or foil informers. Any information about their location is therefore highly susceptible to fabrication or formation on the basis of general knowledge.

Given these difficulties in the specificity of informers' information, and the need for a high probability of accuracy, independent police corroboration will often be required. Under *Spinelli* and *Aquilar v. Texas*<sup>122</sup> it is appropriate "to require independent corroboration of a part of the informant's story where the authorities have provided a benefit of some kind . . . in exchange for his information."<sup>123</sup> But the material facts which justify no-knock will be difficult to verify independently, since the police will have little opportunity to check that evidence themselves.<sup>124</sup> To establish probable cause for no-knock, the corroboration should relate to the informer's statements about the suspect's plans to frustrate the arrest or search. Given the need for corroboration and given the difficulty of specific corroboration of the evidence of resistance or destruction of evidence, informers' statements will seldom by themselves fulfill *Spinelli's* requirements as a basis for probable cause.

*On-the-scene police observations:* In certain carefully delineated situations, on-the-scene observations by the executing officers could establish by themselves a virtually positive showing that evidence was going to be destroyed, the search or arrest resisted, or escape attempted, were entrance preceded by announcement. These situations will be considered below in the discussion of the role of the executing officer.

*Summary:* The only evidence that, standing alone, could usually meet the probable cause test for exceptions to announcement is unequivocal observations of the suspect's behavior by law officers at the scene of the search.<sup>125</sup> The other potential sources of evidence should not by them-

121. For a similar conclusion about assuming that a criminal offense will continue indefinitely, see *People v. Wright*, 367 Mich. 611, 116 N.W.2d 786 (1962); *People v. Siemieniec*, 368 Mich. 405, 118 N.W.2d 430 (1962). See also *Distefano v. United States*, 58 F.2d 963 (5th Cir. 1932).

122. 378 U.S. 108 (1964). Under *Aquilar* the facts underlying the informant's conclusions must be made known to the officer and magistrate making the probable cause decisions.

123. *The Supreme Court, 1968 Term*, *supra* note 110, at 181.

124. There is a question about what type of detail—innocuous detail or facts material to the probable cause showing—must be corroborated. See, e.g., *Draper v. United States*, 358 U.S. 307 (1959) and *Smith v. United States*, 358 F.2d 833, 838 (D.C. Cir. 1966).

125. See pp. 170-71 *infra*.

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selves establish the requisite high probability of frustration of the search or arrest. Police experience with certain classes of offenders, past behavior of the suspect, and the type of drug or weapon present will usually add little to the specific showing necessary to a probable cause finding, although the type of evidence may show that destruction is feasible. The expressed intent of the suspect, his past behavior in reaction to police entrances, the quantity of evidence and its location have greater probative value. In combination, any of these categories may produce in certain cases a "virtually certain" demonstration that evidence will be destroyed, the entrance resisted or an escape attempted. Thus, combinations of categories of evidence, if also meeting the *Spinelli* standards of reliability for informers' statements, in limited situations may establish the degree of probable cause demanded for exceptions to announcement.

### B. *Who Decides Probable Cause*

A *judicial officer* should make most initial decisions about the reasonableness of the use of no-knock authority, since the Fourth Amendment requires judicial supervision of most other searches and seizures to protect Fourth Amendment values.<sup>126</sup> In principle, judicial super-

126. In *Katz v. United States*, 389 U.S. 347, 357 (1967), the Court said:

The constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and over again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

These exceptions to judicial supervision—consent searches, wiretaps, searches of moving vehicles and searches incident to arrest—are supported by reasoning which is inapplicable to abrogation of announcement. In a consent search, of course, notice of identity and purpose are always present in the police request for consent to search. Cf. *Bumper v. North Carolina*, 391 U.S. 543 (1968). The search of a moving vehicle involves notice in that the policeman's authority is manifest in his initial stopping of the vehicle and driver. See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925). Furthermore, the suspect will be aware of the police entrance into his car even if it is not preceded by a statement, since the officer will be in full view. A search of this nature is not nearly as great an affront to personal dignity as the unannounced entry into a home or office. Also, the right of a car-owner to use violence to protect his car from intrusion is far less than that of a homeowner, so the likelihood of violence is proportionately less. It has been contended that since the public is legally subject to wiretaps, which are unannounced, other unannounced searches should be accepted with equanimity by courts and public. Sonnenreich and Ebner, *supra* note 2, at 648. The distinction is that wiretaps present a situation where it is not possible or probable, but *certain*, that evidence will be destroyed if notice is given, since no conversations of investigative significance will take place on the tapped phone. As the Supreme Court said in *Katz v. United States*, 389 U.S. 347, 355 note 16 (1967):

A conventional warrant ordinarily serves to notify the suspect of an intended search. But if *Osborn* [*Osborn v. United States*, 385 U.S. 323 (1966)] had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. In omitting any requirement of advance notice, the federal

vision is desirable; but, since a judicial officer will, in practice, always be distant from the projected entry, it will be exceedingly difficult for him to make a finding that will satisfy the need for high probability and specificity as to person, place and time. This is particularly true since the circumstances that justify no-knock are premised on transitory events subject to momentary change.<sup>127</sup> This time problem can be met by severely limiting the duration of the no-knock warrant. The shorter the interval between issuance and execution of the warrant, the greater the chance of accuracy in the prediction of the suspect's behavior.<sup>128</sup> However, with specificity and high probability as guides, judicial officers will be able to reach a finding of probable cause for the no-knock exceptions on only a few occasions when certain types of evidence appear in combination.<sup>129</sup> Moreover, strict review of magisterial decisions is necessary to insure the important constitutional values of announcement.<sup>130</sup> Detailed supervision must occur since the initial findings of probable cause by judicial officers may often be no more than a rubber stamp acceptance of police contentions.<sup>131</sup>

Despite the difficulties in establishing high levels of specificity at judicial proceedings, discussed above, the basic authority to authorize silent entry must rest with the judicial officer. In certain instances previously unknown facts may be directly observed by *police at the scene of the search* which would permit no-knock in the absence of a warrant.<sup>132</sup> Police ought never have the authority to decide to enter unannounced solely on the basis of prior information; such authority

court that authorized electronic surveillance in *Osborn* simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.

Searches incident to arrest are signified by the arrest itself, which is subject to the same notice requirements as a search in most jurisdictions.

127. See, e.g., pp. 165-68 *supra*.

128. Abbreviation of the warrant's duration, however, could not affect the degree of uncertainty produced by the lapse of time between the gathering of the evidence and the application for the search warrant.

129. Thus a cumulation of evidence has, on occasion, created the "positive" showing necessary to authorize execution of a search warrant at night. See *United States v. West*, 328 F.2d 16 (2d Cir. 1964); *United States v. Plemmons*, 222 F. Supp. 853 (D. Tenn. 1963), *aff'd* 336 F.2d 731 (6th Cir. 1964). See also pp. 162-69 *supra*.

130. Cf. *Weed v. United States*, 340 F.2d 827 (10th Cir. 1965).

131. A study has shown that even where there is formal judicial supervision of warrants that permit forcible entry (with announcement) "[b]ecause of the way in which warrants are issued, there is no meaningful judicial review of the decision. . . ." LAFAYE, ARREST 45 (1965). "[J]udicial officers tend not to take the prior review of a decision as seriously as they do when a motion to suppress is made during subsequent litigation." TIFFANY, MCINTYRE AND ROTENBERG, DETECTION OF CRIME 201 (1967). See also Note, *Metro-politan Criminal Courts of the First Instance*, 70 HARV. L. REV. 320, 327 (1956).

132. Cf. *Chimel v. California*, 395 U.S. 752 (1969), where the Court limited the scope of search incident to arrest to the area within direct observation by officer and suspect at time of arrest.



would completely bypass the vital screening process to be performed by the judiciary. Further, when they receive new information that is not based on on-the-scene observation, like informants' statements, police should not have discretion to evaluate it by themselves.<sup>133</sup>

The probable cause decision for the first two of Justice Brennan's exceptions—where police purpose and identity are known and where someone within is in imminent danger—must necessarily be made on the basis of on-the-scene knowledge, since police could rarely be aware that their presence was known or that someone was in danger until arrival at the scene.<sup>134</sup> Similarly, a direct observation by police on the scene could, by itself, establish the high probability that evidence was going to be destroyed, the search resisted or escape attempted. For example, where police observe the door barricaded and a gambling operation in progress, an intent to frustrate the entrance is clearly foreseeable.<sup>135</sup> This requirement of direct observation is strongly implied by Justice Brennan in *Ker* as necessary to insure the particularity of an exceptional entry,<sup>136</sup> and the second segment of California's *De Santiago* test is similar.<sup>137</sup> However, such instances of on-the-scene observation of facts indicating destruction of evidence or resistance to arrest will be rare.<sup>138</sup>

133. See p. 169 *supra*. Thus if an informer told police on patrol near the suspect's home that the suspect intended to destroy evidence upon entrance, because this evidence is not direct observation and has dangers of unreliability the police should not decide to use no-knock without judicial approval.

134. It would be a rare occurrence when police could be certain their purpose and identity were known to the suspect until they actually approached the scene. See pp. 157-58 *supra*. Similarly, it would be difficult to surmise that a person is in imminent danger before hearing cries or observing an assault at the location of the search or arrest. These two exceptions, therefore, cannot be made grounds for silent entry by the police until they become aware of suspicious activity by the suspects at the time of search.

135. *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

136. Applying this reasoning to the facts in *Ker*, Justice Brennan said:

[T]he minimal conditions for the application of that exception are not present in this case. On the uncontradicted record, not only were the Kers completely unaware of the officer's presence, but again on the uncontradicted record, there was absolutely no activity within the apartment to justify the officers in the belief that anyone within was attempting to destroy the evidence.  
374 U.S. at 61.

137. [W]hen officers prior to entry are able to detect activity from within which leads them to reasonably conclude that the occupants are then engaged in the destruction or concealment of evidence, an unannounced entry would be justified.  
71 Cal. 2d at 29, 76 Cal. Rptr. at 812, 453 P.2d at 360. In fact, the two cases on which California's exceptions to the rule of announcement were built, and gradually expanded, involved behavior by suspects at the time of search which the police *on the scene* could reasonably interpret as attempts to frustrate the arrest. In *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955), officers had observed from the outside that the door was barricaded, before opening the window, identifying themselves and entering. In *Maddox* police had knocked, though not identified themselves, when they heard a voice asking them to wait followed by the sound of retreating footsteps. At this point, where they might have had some reason to suspect that *Maddox* was about to destroy evidence, they entered without further identification.

138. Police guidelines, detailing the circumstances justifying an officer's on-the-scene

## V. No-Knock Legislation Evaluated

Both the D.C. Criminal Procedure Act<sup>139</sup> and the 1970 Drug Act<sup>140</sup> empower law enforcement officers, under certain circumstances, to break into offices and homes without knocking, or giving their identity or purpose. The two pieces of legislation provide that no-knock searches may be authorized by warrants carrying a special no-knock clause.<sup>141</sup> The law enforcement officers must thus apply to a judge or magistrate and show probable cause for the inclusion of the no-knock permission.<sup>142</sup> In the 1970 Drug Act, the authority to determine probable cause is vested solely in the judge or magistrate.<sup>143</sup> The D.C. Criminal Procedure Act makes the judge the first line of supervision, but in addition vests discretion in the executing officer where there is no warrant or where, in the case of a warrant without no-knock, new circumstances become known at time of execution.<sup>144</sup>

The situations that permit no-knock fall within Justice Brennan's list of exceptions. The D.C. Criminal Procedure Act authorizes unannounced entry "upon probable cause to believe such notice is likely

decision to use no-knock, could be developed and enforced to insure that such decisions are consonant with the probable cause standards discussed above. *See* note 151 *infra*. It may be contended that on-the-scene police discretion opens the door to abuse through fabrication of facts that will justify unannounced entry. But concern solely for on-the-scene discretion may be misdirected. Facts on the scene will be more difficult to fabricate than facts justifying a search warrant, since the kinds of information which police may obtain, outside the dwelling, are simply much more limited than the kinds of information which may be concocted by an eager informer.

139. D.C. Code Ann. §§ 23-522(c)(2), 23-591(c)(2). The granting of no-knock powers to police marks a sharp departure from the common law in the District of Columbia, which allowed no exceptions to the announcement rule. The leading District of Columbia case on announcement is *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949). In extensive dicta Judge Prettyman presented an historical account of the announcement rule, concluding that "there is no division of opinion among the learned authors . . . upon the proposition that even where an officer may have power to break open a door without a warrant, he cannot lawfully do so unless he first notifies the occupants as to the purpose of his demand for entry." *Id.* at 462. Despite the fact that this statement was unnecessary for the decision, Judge Prettyman's treatment of the common law became the basis for subsequent District of Columbia interpretations of the announcement rule. The District of Columbia courts have been sparing in the exceptions they have permitted to *Accarino's* unbending call for announcement. *See, e.g., Woods v. United States*, 240 F.2d 237 (D.C. Cir. 1959) (opinion by Burger, J.); *Keiningham v. United States*, 287 F.2d 126 (D.C. Cir. 1960) (entrance through unlocked door is entry without permission within the meaning of common law); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961). There is a question whether these decisions were followed in practice. *See, e.g., Washington Post*, Sept. 26, 1970, at B1-B2, col. 6.

140. 1970 Drug Act § 509(b).

141. 1970 Drug Act § 509(b); D.C. Code Ann. §§ 23-521(f)(6), 23-522(c)(2). The 1970 Drug Act provides no-knock only for execution of search warrants. The D.C. Criminal Procedure Act authorizes it for execution of search and arrest warrants as well as warrantless searches and arrests. § 23-591(c)(2).

142. 1970 Drug Act § 509(b); D.C. Code Ann. § 23-522(f)(2).

143. There is no reason, though, why the agents should not also retain the common law power of no-knock as interpreted by *Miller* and *Ker*. If circumstances at the time of search necessitated, they could use this power to make a silent entry.

144. D.C. Code Ann. § 23-591(c)(2).

to result" in destruction of evidence, resistance or escape, or if purpose and identity are known.<sup>145</sup> The 1970 Drug Act authorizes no-knock upon "probable cause to believe that . . . if such notice is given" the evidence "will" be destroyed or the safety of the executing officer or another "will" be endangered.<sup>146</sup> In the abstract, these probable cause definitions do not negate constitutional guarantees; the fundamental issue is their administration.

The evidentiary requirements deemed necessary to satisfy these definitions of probable cause may not meet the requirements of specificity and high probability. It is possible that general police experience with classes of crimes will justify no-knock under these probable cause definitions. Certainly the bare language of the provisions does not rule out this possibility, for with some offenses it may be more probable than not that evidence will be destroyed. The legislative history of the D.C. Criminal Procedure Act makes it at least arguable that police experience with a general class of crime is enough to get a no-knock warrant for any search or arrest involving the given offense.<sup>147</sup> On the other hand, the legislative history of the 1970 Drug Act in the Senate indicates that "it is not enough just to show that the particular substance which is being sought is of such nature that it could easily be destroyed . . . ."<sup>148</sup>

145. D.C. Code Ann. § 23-591(c)(2) authorizes no-knock

[u]pon probable cause to believe (a) such notice is likely to result in the evidence subject to seizure being easily and quickly destroyed or disposed of, (b) such notice is likely to endanger the life or safety of the officer or another person, (c) such notice is likely to enable the party to be arrested to escape, or (d) such notice would be a useless gesture.

There are two levels where this probable cause determination may be made. A judge or magistrate in the District of Columbia may include a no-knock direction of a search or arrest warrant under conditions (a), (b) or (d) above. § 23-522(c)(2). A police officer may choose to use no-knock on the basis of facts discovered at the scene of the search or arrest if conditions (a), (b), (c), or (d) prevail. § 23-591(c)(2). The "useless gesture" referred to in (d) means only announcement when purpose and identity are known. See CONG. COMM. REP. ON DISTRICT OF COLUM. COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970, H.R. REP. 1303, 91st Cong., 2d Sess. 237 (1970).

146. § 509(b) of the 1970 Drug Act authorizes no-knock entry when the judge or magistrate has

probable cause to believe that (A) the property sought may and, if such notice is given will, be easily and quickly destroyed or disposed of, or (B) the giving of such notice will immediately endanger the life or safety of the executing officer or another person . . . .

147. The House of Representatives Committee on the District of Columbia, which originated the Act's language, explicitly followed Justice Clark's opinion in *Ker*, which it interpreted as upholding "no-knock authorization . . . based wholly on the general experience of the police officers . . . ." H.R. REP. NO. 907, 91st Cong., 2d Sess. 106. But see the conference committee report, intending that "the no-knock provision of the conference bill shall not be bound by relevant and conflicting statements if any, contained in H.R. REP. NO. 91-907 and S. REP. 91-538." COMM. OF CONFERENCE, DISTRICT OF COLUM. COURT REFORM AND CRIMINAL PROCEDURE ACT OF 1970, H.R. REP. NO. 1303, 91st Cong., 2d Sess.

148. 116 CONG. REG. § 694 (daily ed. Jan. 27, 1970) (remarks of Senators Tydings and Griffin).

It is fairly certain that both pieces of legislation unless severely restricted will countenance probable cause found by any one of the following kinds of evidence: 1) past convictions of suspect; 2) past behavior in response to police entries; and informers' statements about 3) type, 4) location, and 5) quantity of evidence; or 6) an expressed intent to destroy evidence or frustrate the search. The sponsor of the 1969 Drug Bill, Senator Dodd, after emphasizing that general police experience with drug traffickers would not constitute probable cause, stated that "[i]nformation regarding the actual location of the drug, the type and quantity, or the propensity of the subject to be violent"<sup>149</sup> would suffice. By allowing no-knock on a mere showing of a certain kind of offense, or solely on information about location or type of drug, or past behavior of the suspect, for example, the D.C. Criminal Procedure Act and the 1970 Drug Act would endanger the Fourth Amendment values of announcement.<sup>150</sup>

Neither Act requires the warrant to be sharply limited in duration, so as to be specific in time or place. Nor are the Acts cognizant of the problems with different types of evidence going to probable cause and with informers and thus of the need for strict judicial review of this evidence. Also the D.C. Criminal Procedure Act, which gives the executing officer discretion in new circumstances, does not delimit those circumstances in which discretion is properly exercised.

Thus, though the statutory definitions of exceptions to announcement are acceptable, the Acts' treatment of what constitutes probable cause, and who makes that decision are not at all adequate. The result will probably be the broad and frequent use of no-knock powers when the suspect may not in fact be destroying evidence, resisting the entry or trying to escape. The maintenance of the constitutional values of announcement demands stringent probable cause requirements. Admittedly the approach suggested above would permit no-knock in only very few instances. But the no-knock provisions of the 1970 Drug Act and the D.C. Criminal Procedure Act should be interpreted in this way if they are to be consistent with the constitutional requirements of the Fourth Amendment's announcement rule.<sup>151</sup>

149. 116 CONG. REG. § 588 (daily ed. Jan. 24, 1970).

150. Compare discussion of evidence meeting this principle, pp. 162-68 *supra*.

151. This interpretation of the federal statutes, as with all exceptions to announcement, would be enforced through use of the exclusionary rule. See p. 156 *supra*. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970), makes a forceful argument that the exclusionary rule is a failure in directly deterring illegal searches and seizures. The standard of probable cause and its application to evidence suggested above can and should be enforced through any technique effective in deterring

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illegal police behavior. Oaks suggests an effective tort remedy against the offending officer or his employer. Oaks, *supra*, at 717-18, 756. Such a tort remedy could be developed under common law or section 1983 of the federal Civil Rights Act. *See generally* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Symposium, *Police Tort Liability*, 16 CLEVE.-MAR. L. REV. 397-454 (1967). Apart from tort actions, there is the possibility of administrative compensation for damage to doors caused by an unnecessary no-knock entry, with the payment coming from police budgets. *Cf.* policy in Washington, D.C. at note 66 *supra*.

Other alternatives include the development of guidelines for prosecutors and police detailing the situations where no-knock is permitted. *See, e.g.*, K. DAVIS, *DISCRETIONARY JUSTICE* 188-90, 222-25 (1969). Such guidelines are particularly necessary for officers to decide what on-the-scene circumstances warrant their independent use of no-knock, presently an area of wide discretion. Reports could be filed about each no-knock entry, increasing its visibility. It would necessarily follow that sanctions would be applied to officers or prosecutors who violated the guidelines. Obviously, these, and other, approaches have to be much more fully explored and empirically tested before being put into practice. The important point is that once we recognize the need for stringent limitations on unannounced entries by police, means must be found to enforce them effectively.